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No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. LINDA A. LUJAN,

Petitioners,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

In *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988) this Court determined that a decision by a Court of Appeals to transfer to another court necessarily decided that the transferee court had jurisdiction and this determination constituted the law of the case.

The questions presented here are:

I. WHETHER A DECISION BY A COURT OF APPEALS TO REMAND TO A DISTRICT COURT CONSTITUTES LAW OF THE CASE IMPLICITLY REJECTING A JURISDICTIONAL CHALLENGE THAT WAS URGED BEFORE THE COURT OF APPEALS BUT NOT DISCUSSED IN ITS OPINION.

II. WHETHER A COURT OF APPEALS MUST RESPOND TO A SUBSTANTIAL, STRONGLY PRESENTED ARGUMENT THAT A DECISION OF THIS COURT IS CONTROLLING OR DOES IT PROPERLY PERFORM ITS ROLE AS A SUBORDINATE FEDERAL COURT BY IGNORING, WITHOUT ANY RECOGNITION OF ITS EXISTENCE, THE DECISION OF THIS COURT URGED UPON IT.

LIST OF PARTIES

United States of America

Linda A. Lujan

Hughes Aircraft Company

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United States ex rel. Lujan v. Hughes Aircraft Company, 67 F.3d 342 (9th Cir. 1995), reprinted in the appendix. App. 36.

PETITION FOR WRIT OF CERTIORARI

Petitioner, the United States of America ex rel. Linda A. Lujan, respectfully prays that a Writ of Certiorari issues to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on March 22, 2001, in the above-entitled proceeding. Petitioners' petition for rehearing and the petition for rehearing en banc were denied by the United States Court of Appeals for the Ninth Circuit on June 5, 2001. App. 50.

JURISDICTIONAL STATEMENT

The judgment of the court of appeals was entered on March 22, 2001. The petition for rehearing and the petition for rehearing en banc were denied on June 5, 2001.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

False Claims Act, 31 U.S.C. §§ 3729-3733. App. 51.

I. STATEMENT OF THE CASE

This appeal involves a *qui tam* action which was initially filed in 1992 by relator Linda A. Lujan pursuant to the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, against her former employer, Hughes Aircraft Company ("Hughes"). Her First Amended Complaint ("Complaint") was filed on August 3, 1992. Lujan's Complaint alleged that Hughes mischarged costs among various contracts associated with the B-2 radar systems; mischarged the government by failing to follow "Commonality Agreements" for sharing of costs among various government radar programs; made unapproved engineering design changes to the B-2 radar systems; mischarged to the B-2 radar systems overhead and various other costs incurred for other government radar programs; submitted fraudulent historical cost and pricing data during negotiation of B-2 contracts; and substituted nonconforming, substandard, and unauthorized materials and parts in the production of the B-2 radar systems.

Lujan's *qui tam* action has been dismissed three times by the United States District Court for the Central District of California. Lujan appealed each of these dismissals to the Court of Appeals for the Ninth Circuit. The Court of

Appeals for the Ninth Circuit had jurisdiction over each matter pursuant to 28 U.S.C. § 1291.

The first dismissal by the district court, on the ground that Lujan had violated the seal placed on her complaint pursuant to 31 U.S.C. § 3730(b)(2), was reversed by the Court of Appeals for the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242 (9th Cir. 1995) ("*Lujan I*"). App. 36.

The second dismissal by the district court, on the ground that the allegations were "publicly disclosed" by Schumer's 1989 *qui tam* action, and therefore precluded by 31 U.S.C. § 3730(e)(4), was also reversed by the Court of Appeals for the Ninth Circuit in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027 (9th Cir. 1998) ("*Lujan II*"). App. 18. In *Lujan II*, the Court of Appeals for the Ninth Circuit reversed the district's court's dismissal for want of subject matter jurisdiction and held that Lujan was entitled to prosecute her *qui tam* claims because she was the "original source" of her allegations against Hughes within the meaning of the False Claim Act.

In *Lujan II*, Hughes first raised the statutory first-to-file bar that served as the basis for the decision in *Lujan III*, which is the subject of this Writ. In addition to arguing that the district court was correct in dismissing Lujan's case pursuant to the public disclosure bar, Hughes argued in its brief and on oral argument that Lujan's case must be dismissed pursuant to 31 U.S.C. § 3730(b)(5), which provides:

> When a person brings an action under this subsection, no person other than the Government

> may intervene or bring a related action based on the facts underlying the pending action.

As mentioned above, the Court of Appeals for the Ninth Circuit reversed the district court's dismissal of Lujan's *qui tam* claims because it found, after extensive consideration, that Lujan was an "original source" of the allegations within the meaning of 31 U.S.C. § 3730(e)(4)(A), and therefore, that there was subject matter jurisdiction. *Lujan II*, 162 F.3d 1027. The Court pointed out that "Lujan disclosed her allegations to the government before similar allegations were publicly disclosed by Schumer's lawsuit," and that Lujan "also acted promptly to remedy the perceived wrongdoing." *Id.* at 1034.

Hughes again raised its § 3730(b)(5) argument in its unsuccessful Petition for Rehearing and/or Rehearing En Banc. Hughes reiterated that it was raising the § 3730(b)(5) argument as *"an assertion of lack of subject matter jurisdiction"* (emphasis supplied). The Court of Appeals for the Ninth Circuit denied Hughes' petition for rehearing and remanded Lujan's *qui tam* claims to the district court. *Lujan II*, 162 F.3d at 1035. The Court of Appeals expressly held that "the district court has subject matter jurisdiction . . . [over] Lujan's post-1986 *qui tam* claims." *Lujan II*, 162 F.3d at 1034.

Following that remand, Hughes renewed, in the form of a motion to dismiss directed to the district court, the § 3730(b)(5) arguments it had previously made to the Ninth Circuit. The district court for a third time dismissed Lujan's *qui tam* action. Lujan appealed this dismissal to the Court of Appeals for the Ninth Circuit

pursuant to 28 U.S.C. § 1291. Lujan strongly urged in her brief and on oral argument that this Court's decision in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988), was controlling and thus required a reversal.

This time, however, the Court of Appeals for the Ninth Circuit affirmed the dismissal in *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181 (9th Cir. 2001) ("*Lujan III*"), entered March 22, 2001. App. 1. In *Lujan III* the Court of Appeals affirmed the district court's dismissal on first-to-file grounds arguments. Thus, the *Lujan III* decision rejected "Lujan's content[ion] that the law of the case doctrine precluded the district court's consideration of Hughes' § 3730(b)(5) jurisdictional challenge." *Lujan III*, 243 F.3d at 1186. The decision acknowledged that "[t]he doctrine applies to the appellate court's 'explicit decisions as well as those issues decided by necessary implication." *Id.* at 1186-87 (quoting *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir. 1989)). Without explanation, *Lujan III* further found that the Court of Appeals did not implicitly decide the first-to-file challenge in *Lujan II*, notwithstanding the fact that Hughes argued the point on three separate occasions and that the *Lujan II* court remanded the case finding proper subject matter jurisdiction over Lujan's *qui tam* claims. The Court stated *Lujan II* was not controlling:

> In *Lujan II*, we reversed the district court's dismissal of Lujan's post-1986 claims for lack of subject matter jurisdiction under § 3730(e)(4). While Hughes argued § 3730(b)(5) jurisdictional challenge to this court, we did not explicitly or implicitly decide that issue. Therefore, the law of the case did not foreclose consideration of the § 3730(b)(5) jurisdiction issue. Even if we had

> decided the § 3730(b)(5) jurisdictional question in Lujan's favor, we can correct that decision to prevent manifest injustice. *See Southwest Marine v. Danzig*, 217 F.3d 1128, 1136 (9th Cir. 2000) ("prior decision should be followed unless . . . the decision is clearly erroneous and its enforcement would work a manifest injustice") (internal quotations omitted).

Lujan III, 243 F.3d at 1187.

II. REASONS FOR GRANTING THE WRIT

A. THE COURT OF APPEALS FOR THE NINTH CIRCUIT'S HOLDING DISREGARDING LAW OF THE CASE DOCTRINE CONFLICTS WITH A CONTROLLING DECISION OF THIS COURT, IGNORES A CONFLICT AMONG THE CIRCUITS, AND DOES NOT SHOW PROPER ATTENTION TO A DECISION OF THIS COURT URGED AS CONTROLLING.

There are three compelling reasons for granting the writ. *First*, the issue of the scope of *Christianson* as to *sub silento* jurisdictional holdings should be resolved in order to lighten the burden of unnecessary multiple appeals upon the courts and litigants. *Second*, there is a clear and acknowledged split among the circuits on whether *Christianson* is confined solely to instances in which the court of appeals orders a transfer or whether its scope is broader. *Third*, in the exercise of its supervisory jurisdiction over subordinate courts this Court should remind the lower courts that when a decision of this court is urged, with substantial logic, as a controlling precedent

the lower court is not free to ignore that decision and should either distinguish it, however, briefly or follow it.

This Court's holding in *Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800 (1988) is controlling and dispositive authority that in remanding Lujan's *qui tam* claims to the district court in 1998, *Lujan II* had implicitly decided and rejected Hughes' § 3730(b)(5) jurisdictional challenge and that that decision constituted law of the case. *Christianson* teaches that a decision by a court to transfer (or remand) a case to another court necessarily involves a decision that the recipient court has jurisdiction. In *Christianson*, after full briefing and argument, the Court of Appeals for the Federal Circuit had issued an order transferring the case to the Court of Appeals for the Seventh Circuit. Although the order did not discuss the issue, this Court held that the order decided the jurisdictional issue and constituted the law of the case:

> That the Federal Circuit did not explicate its rationale is irrelevant, for the law of the case turns on whether a court previously 'decide[d] upon a rule of law' – which the Federal Circuit necessarily did – not on whether, or how well, it explained the decision.

486 U.S. at 817.

That *Christianson* involved a case transfer, and not a remand, is of no concern. The *Lujan II* Court's remand to the district court was equivalent to the transfer at issue in *Christianson*. In *LaShawn A. v. Barry*, 87 F.3d 1389 (D.C. Cir. 1996), the Court of Appeals for the District of Columbia expressly applied the holding in *Christianson* to a remand to the district court. The dissent argued that

applying law of the case should turn on the explicitness of the court's prior mandate. The D.C. Circuit held:

> The Supreme Court's holding in *Christianson* "renders the dissent's complaint irrelevant." The law-of-the-case doctrine, the Supreme Court said, turns "on whether a court previously decide[d] upon a rule of law . . . not whether, or how well, it explained the decision."

LaShawn, 87 F.3d at 1394 (en banc).

There is a split of authority in the federal circuits regarding the law of the case doctrine. In *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, the Court of Appeals for the Third Circuit held that the Court of Appeals affirmance of the district court's ruling that a public interest group had standing to sue permittee under the Clean Water Act did not preclude the Court of Appeals, under the "law of the case doctrine," from reexamining that holding on subsequent appeal. *Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3rd Cir. 1997). The Court explained, "Thus, we read *Christianson's* discussion of the law of the case, as it relates to jurisdiction, to apply only to transfer cases and not to cases that raise serious jurisdictional concerns, such as plaintiff's standing to sue." *Id.* The Court, however, acknowledged that, "In doing so, we recognize that two sister circuits have held that the law of the case doctrine applies to subject matter jurisdiction." *Id.* Therefore, there is a clear and acknowledged split among the circuits regarding the scope of *Christianson*.

Turning to the case at hand, in 1998, the Court of Appeals for the Ninth Circuit reversed the district court's

holding that it was without subject matter jurisdiction over Lujan's *qui tam* action and remanded Lujan's post-1986 *qui tam* claims to the district court. *Lujan II*, 162 F.3d 1027. The *Lujan II* court remanded, and explicitly held that the district court had jurisdiction over Lujan's *qui tam* claims after Hughes had thrice raised its § 3730(b)(5) challenge. At that time, the *Lujan II* court was duty bound to consider this jurisdictional challenge. "[Q]uestions of jurisdiction, of course, should be given priority – since if there is no jurisdiction there is no authority to sit in judgment of anything else." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 at 778 (2000). "[T]he rule is settled that if the decision below is correct, it must be affirmed although the lower court relied on a wrong ground or gave a wrong reason." *Helvering v. Gowran*, 302 U.S. 238, 245 (1937). In these circumstances, *Christianson* must be controlling.

It is extremely important to note that Lujan argued that *Christianson* was controlling authority in her initial and reply briefs to the Court of Appeals for the Ninth Circuit. Yet, *Lujan III* does not even mention *Christianson*, let alone attempt to explain why *Christianson* does not dispose of Hughes' attempt to relitigate its § 3730(b)(5) argument.

B. TREATING THE *SCHUMER* CASE AS A NULLITY IS NOT CLEAR ERROR AND WORKS NO MANIFEST INJUSTICE

It appears that *Lujan III* finds that the law of the case "should be followed unless . . . the decision is clearly

erroneous *and* its enforcement would work a manifest injustice." *Lujan III*, 243 F.3d at 1187 (emphasis supplied) (quoting *Southwest Marine Inc. v. Danzig*, 217 F.3d 1128, 1135 (9th Cir. 2000). Neither of the two prongs were satisfied here. There was no clear error in declining to dismiss Lujan's claims based on a purportedly "pending" action that was a legal nullity. *Cf. Drake v. Cheney*, No. 91-1553, 1992 U.S. App. LEXIS 7294 * 8 (4th Cir. Apr. 15, 1992) ("civil action was not 'pending' in federal court" where the district court "at no time had subject-matter- . . . jurisdiction"). There was also no manifest injustice. "The existence of exceptional circumstances is required before finding a manifest injustice. . . . At a minimum, the challenged decision should involve a significant inequity or the extinguishment of a right before being characterized as manifestly unjust." *Jeffries v. Wood*, 114 F.3d 1484, 1492 (9th Cir. 1997) (en banc).

Lujan III strongly suggests that it would be "clearly erroneous" and a "manifest injustice" if *Lujan II* "had decided the § 3730(b)(5) jurisdictional question in Lujan's favor. . . . " *Lujan II*, 243 F.3d at 1187. This apparent holding is error and its result works a manifest injustice.

As background, William Schumer's *qui tam* complaint against Hughes alleged mischarging on the B-2 radar program. In 1997, this Court dismissed that complaint for lack of subject matter jurisdiction, after Hughes sought review of the Court of Appeals for the Ninth Circuit's finding that the 1986 amendments to the False Claims Act were retrospective. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997). In *Schumer*, this Court held that "the District Court was obliged to dismiss this

action because it was 'based on evidence or information the Government had when the action was brought.' 31 U.S.C. § 3730(b)(4) (1982 ed.)." *Id.* at 952.

In *Lujan II* the Court of Appeals for the Ninth Circuit correctly held that Lujan was the "original source" properly entitled to litigate and seek restitution on behalf of the government for Hughes' False Claims violations. In *Lujan III*, however, the Court vitiated its prior ruling and found that Hughes is now immunized from suit as a result of an earlier filed suit, *Hughes Aircraft Co. v. United States ex rel. Schumer,* that as mentioned above, this Court has previously held to be jurisdictionally invalid and therefore a legal nullity from its inception.

1. *Lujan II*'s Implicit Rejection of Hughes' First-To-File Challenge Is Not Clearly Erroneous

The *Lujan II* panel knew that Schumer's case was a legal nullity when it remanded Lujan's *qui tam* claims to the district court. *Lujan II*, 162 F.3d at 1030. It found jurisdiction and remanded her *qui tam* claims notwithstanding its legal duty to consider Hughes' first-to-file challenge and affirm the dismissal of Lujan's claims if Hughes was right. *Helvering v. Gowran*, 302 U.S. at 245. Indeed, "the first and fundamental question" that the Court had to decide was "that of jurisdiction, first of the [Court itself] and then of the court from which the record comes. . . . " *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998). Given these considerations it was in no way "clearly erroneous" for *Lujan II* to find jurisdiction over

Lujan's *qui tam* claims and remand the action. Section 3730(b)(5) provides:

> When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action.

The statute is clear that if there is no "pending action" the provision is not applicable. Because Schumer's action should have been dismissed at the outset by the district court, it was a nullity from the outset. It could not at any time have been a "pending action." Congress never intended that a suit that should not have been filed, and which when filed should have been dismissed immediately for want of jurisdiction, should bar a subsequent plaintiff who is the very type of relator-plaintiff whose suit Congress sought to encourage.

Because there was no federal jurisdiction, the *Schumer* action was a legal nullity. "Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Vermont Agency*, 529 U.S. at 778-79 (quoting *Ex Parte McCardle*, 74 U.S. 506 (1869)). Without jurisdiction, the action "is not voidable merely but void. . . . The proceeding is a nullity." *Noble v. Union River Logging R.R.*, 147 U.S. 165, 173 (1893). "[W]hen subject matter jurisdiction is lacking the district court 'ha[s] no power to do anything, other than to dismiss the action,' and any order other than to dismiss is a nullity." *Morongo Band of Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1380 (9th Cir. 1988) (quoting *United States v. Boe*, 543 F.2d 151, 159 (C.C.P.A. 1976). "A void

judgment is a legal nullity." *Watts v. Pickey*, 752 F.2d 406, 409 (9th Cir. 1985).

If Schumer's complaint had been dismissed immediately, as it should have been (*see Hughes*, 520 U.S. at 941-42), there would have been no pending action when Lujan's suit was filed, and therefore, § 3730(b)(5) could not even arguably have barred her action. Congress only precluded suit while another suit based on the same facts was pending. Congress could not have intended that the courts' delay in applying correctly the jurisdictional bar to dismiss the *Schumer* case was intended to preclude a suit from being brought by the very individual whose action the Congress sought to encourage – a suit by an original source that was not parasitic in any way. *Lujan II*, 163 F.3d at 1034.

In *Drake v. Cheney*, the Court of Appeals for the Fourth Circuit was faced with a similar situation. There the Equal Employment Opportunity Commission was required to cancel any complaint "that is the basis of a pending civil action in a United States District Court." 1992 U.S. App. LEXIS, at *5 (quoting 29 C.F.R. § 1613.215(a)(3) (1987)). Drake complained to the agency that he had been subject to unlawful discrimination. Drake then filed a civil complaint in federal court, alleging the same facts. *Id.* at *3. The agency held that an action then pending before a district court required it to cancel the administrative complaint. Subsequently, the district court action was dismissed for want of subject matter jurisdiction. *Id.* at *6.

The court of appeals held that because the district court "at no time had subject-matter . . . jurisdiction" "in

effect [his] suit against his employer was a nullity." *Id.* at *8. It concluded "that, at the time the agency canceled [the] complaint, a civil action was not 'pending' in federal court within the meaning of the regulations." *Id.* at *8. That reasoning is equally applicable here: Schumer's action, over which the court lacked subject matter jurisdiction, was not "pending" within the meaning of the statute.

In *Lujan III*, the Ninth Circuit attempted to distinguish *Drake* as "involving a different statute and actions filed by the same person." *Lujan III*, 243 F.3d at 1188 n.11. However, the issue was the same, *i.e.*, the meaning of "pending." *Lujan III* instead relied upon the Court of Appeals for the Second Circuit's "unpublished opinion" in *United States ex rel. Pentagen Technologies International, Ltd. v. CACI International Inc.*, 172 F.3d 39 (2d Cir. 1999) and *United States v. Crescent City E.M.S., Inc.*, 946 F. Supp. 447, 450 (E.D. La. 1996). *Pentagen* is an unpublished "summary order" and pursuant to Second Circuit Local Rule § 0.23 "shall not be cited or otherwise used in unrelated cases before this or any other court." *Pentagen* was not intended to have precedential value. The dicta in *Crescent City* is patently wrong. *Crescent City* states that a *dismissed suit* can serve as a bar under § 3730(b)(5). To the contrary, § 3730(b)(5) is limited to "pending" suits, not suits that were once "pending" (or never pending, because they were legal nullities, such as Schumer's). In sum, *Lujan III* fails to show, and cannot show that *Lujan II*'s implicit rejection of Hughes' first-to-file challenge was "clearly erroneous".

2. *Lujan II*'s Implicit Rejection of Hughes' First-to-File Argument Works No Manifest Injustice Against Hughes

Lujan II's implicit rejection of Hughes' § 3730(b)(5) argument in no way works a "significant inequity" upon Hughes or "extinguish[es]" Hughes' rights. Hughes had no right to perpetually reargue its first-to-file challenge. "[A] court that has decided that it has jurisdiction is not duty bound to entertain . . . a series of repetitive motions to dismiss for lack of jurisdiction." *Ferreira v. Borja*, 93 F.3d 671, 674 (9th Cir. 1996). "Perpetual litigation of any issue – jurisdictional or nonjurisdictional – delays, and therefore threatens to deny, justice." *Christianson*, 486 U.S. at 816 n.5. Nor is Hughes in any way prejudiced in having to defend against Lujan's *qui tam* claims, claims brought by the true "original source."

To the contrary, the equities are exclusively in favor of Lujan, and her representation of the United States' interest. *Lujan III* was wrong to find that Congress intended that a suit that is a nullity should have the result of precluding a proper relator from bringing an action that can benefit the United States Treasury. *Lujan III*, 243 F.3d at 1188. Congress certainly did not intend that relators should have ***no*** bite at the apple. *Lujan III* was also wrong to find and emphasize that "Schumer's action promptly alerted the government to the essential facts of a fraudulent scheme. . . . " *Id.* at 1187 n.10. Prior to the 1986 amendments to the False Claims Act a *qui tam* suit was barred by prior government knowledge. Congress removed that bar. See S.Rep.No. 99-345 at 12 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5277. *Lujan III*, 243 F.3d 1188 n.10, erroneously restores the bar by blocking Lujan

the original source because "[t]he government knew of . . . Schumer's allegations."

Contrary to *Lujan III*, barring Lujan, the "original source" – the true statutory whistleblower from going forward thwarts legislative intent. It is immaterial that the government has declined to intervene; the statute is intended to permit suits by relators in order to provide the government additional helping hands. The Senate Report to the 1986 amendments explains:

> An additional problem noted by hearing witnesses, exists when large, profitable corporations are the subject of a fraud investigation and able to devote many times the manpower and resources available to the Government. This resource mismatch was recognized by DOD Inspector General Joseph Sherick who said that in far too many instances the Government's enforcement team is overmatched by the legal teams major contractors retain.
>
> The Committee believes that the amendments in S. 1562 which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort.

S. Rep.No. 99-345 at 8 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5273. Contrary to *Lujan III*, nothing supports the perverse contention that Congress intended that a suit that is a nullity should preclude a proper relator from bringing an action that can benefit the public. But for purposes of the case all that is necessary is the proper determination that treating *Schumer* as a legal nullity not barring Lujan's suit is neither clear error nor manifest injustice.

III. CONCLUSION

Petitioner, the United States of America ex rel. Linda A. Lujan, respectfully requests that, for the reasons stated above, the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, ex rel. Linda A. LUJAN,
Plaintiffs-Appellants,
v.
HUGHES AIRCARFT COMPANY, Defendant-Appellee.
No. 00-55328.
Argued and Submitted Feb. 7, 2001
Filed March 22, 2001

Daniel I. Davidson, Spiegel & McDarmid, Washington, D.C., for the plaintiff-appellant.

Mark R. Troy, James J. Gallagher, Michael R. Rizzo and Kevin J. Slattum, McKenna & Cuneo, L.L.P., Los Angeles, California, for the defendant-appellee.

Appeal from the United States District Court for the Central District of California; Stephen V. Wilson, District Judge, Presiding. D.C. No. CV-92-01282-SVW.

Before: *LEAVY, TROTT*, and *SILVERMAN*, Circuit Judges.

SILVERMAN, Circuit Judge:

The False Claims Act (FCA) permits, in certain circumstances, suits by private parties on behalf of the United States against anyone submitting a false claim to the government. In 1986, Congress amended the FCA to include § 3730(b)(5), which provides that "[w]hen a person brings a [qui tam action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." This appeal requires us to interpret § 3730(b)(5) for the first time. We hold that § 3730(b)(5) establishes an exception-free, first-to-file bar. We further hold that subsequently dismissed cases constitute pending actions under § 3730(b)(5). Finally, we hold that a "material facts," not

"identical facts," test should be used to determine if a "related action [is] based on the facts underlying the pending action." § 3730(b)(5). We affirm the district court's dismissal of Lujan's qui tam action for lack of subject matter jurisdiction under § 3730(b)(5).

I. Background and Proceedings

Linda Lujan and William Schumer, former Hughes Aircraft Company employees, brought separate qui tam claims alleging that Hughes fraudulently used "commonality agreements".[1] Determining whether § 3730(b)(5) bars Lujan's action necessarily involves reviewing Schumer's action.

A. *United States ex rel. Schumer v. Hughes Aircraft Company*

In 1989, former Hughes manager William Schumer filed a qui tam action against Hughes asserting that Hughes defrauded the United States government by entering into unauthorized and illegal commonality agreements allocating project costs over more than one

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[1] The Air Force awarded a defense contract for constructing the B-2 bomber to Northrup Corporation, which then in 1982 awarded Hughes a "cost-plus" subcontract to develop the bomber's radar system. Hughes was subsequently awarded "fixed-price" contracts for developing other aircrafts' radar systems. Due to the contracts' significant overlap, Hughes adopted "commonality agreements" allocating costs between various contracts using common components.

subcontract. The government declined to intervene.[2] In May 1992, the district court found the commonality agreements proper, and granted summary judgment in favor of Hughes.

Schumer appealed and Hughes cross-appealed, arguing "that because government auditors had alleged the same mischarging prior to Schumer's filing, the action was barred under the 'government knowledge' defense, 31 U.S.C. § 3730(b)(4) (1982)." While acknowledging that the 1986 amendments eliminated the government knowledge defense,[3] Hughes argued that the 1986 amendments

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[2] Government auditors scrutinized costs subject to Hughes' commonality agreements and, in 1986, initially concluded that Hughes had misallocated costs. Subsequent audits between 1986 and 1988 concluded that Hughes had not adequately disclosed its commonality accounting practices. Therefore, the Government ordered Northrop to withhold contract payment to Hughes. After conducting additional audits in 1990 and 1991, the Government reversed its preliminary determination, concluded that the commonality agreements benefitted the Government, and ordered Northrop to pay Hughes. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 942-43 n. 1, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997).

[3] Before 1986, the FCA barred cases brought by qui tam plaintiffs whose allegations were "based on evidence or information the Government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982). The 1986 amendments eliminate the government knowledge defense. Incorporating the 1986 amendments, § 3730(e)(4) provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the

could not be applied retroactively to Hughes pre-1986 conduct. We held that the 1986 amendments applied retroactively to Hughes' pre-1986 conduct, affirmed the majority of the district court's findings, and remanded two factual issues regarding pre-1986 conduct. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1528 (9th Cir.1995).

The Supreme Court granted certiorari[4] and reversed, holding that the 1986 amendments could not be applied retroactively to pre-1986 conduct. The Court declined to review the remaining issues and held that the claims should have been dismissed, because the district court did not have jurisdiction over the pre-1986 conduct due to the government knowledge exception.[5] *See Hughes*

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news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

[4] The Supreme Court granted certiorari as to (1) whether the 1986 amendments retroactively applied to pre-1986 conduct, (2) whether Schumer's claims were jurisdictionally barred by the FCA public disclosure provisions, and (3) whether the two factual issues remanded by the Ninth Circuit could give rise to a FCA claim given the government's determination that it had not suffered any financial harm.

[5] Schumer's post-1986 conduct claims were decided against Schumer on the merits, and affirmed by the Ninth Circuit. Therefore, while the Supreme Court ordered the case

Aircraft Co. v. United States ex rel. Schumer, 520 U.S. 939, 952, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997).

B. *United States ex rel. Lujan v. Hughes Aircraft Company*

This is the third appeal in this case.

In February 1992, Lujan filed qui tam claims against Hughes for alleged fraud and retaliation claims for her employment termination.[6] Lujan alleged that Hughes was engaging in fraudulent contracting practices by shifting costs from fixed-price programs to cost-plus programs. Pursuant to 31 U.S.C. § 3730(b)(2), Lujan filed her claim in camera and served it on the Government. While the qui tam claim was still under seal and before Hughes had been served with the complaint, the Los Angeles Times ran two articles reporting Lujan's qui tam claim filing. The district court held that Lujan's public disclosure of the existence and substance of her qui tam complaint violated the FCA's statutory seal provision, § 3730(b)(2), and dismissed the action.

We reversed the district court. *See Lujan v. Hughes Aircraft Co. (Lujan I)*, 67 F.3d 242, 248 (9th Cir.1995). We held that the use of dismissal as a sanction was not necessarily the appropriate remedy for Lujan's violation. *See id.* at 247-48. In addition, we held *sua sponte* that before the district court could reach the merits of Lujan's

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dismissed, the district court should have differentiated between the pre and post-1986 conduct and claims.

[6] Lujan's retaliation claim, which the district court and this court held to be time-barred, is not at issue in this appeal.

claim, it would have to determine if it had jurisdiction under § 3730(e)(4)(A), which "bars suits brought after the allegations in the complaint have been publicly disclosed, unless the relator is the 'original source' of the information." *Id.* at 248. We noted the similarities between Lujan's complaint and the earlier filed *Schumer* complaint.

In March 1996, the district court found that Lujan's allegations were "substantially similar" and therefore "based upon" those publicly disclosed in *Schumer:*

> Lujan's qui tam allegations are substantially similar to Schumer's previous claims. Lujan attempts to distinguish her allegations by stating that they involve mischarging *within* the B-2 program, while Schumer addressed cost shifting *among* the B-2 program and other aircrafts [F-14D, F-15 MSIP, and F-18]. However, upon reviewing the allegations previously brought by Schumer, the Court finds that Lujan's allegations are simply a variation on Schumer's.
>
> Schumer's claims, like Lujan's involve the B-2 bomber system, which was a massive, billion dollar contract. With such large stakes at hand, the government necessarily performed a thorough review of Schumer's claims as evidenced by the *Schumer* record and proceedings. Lujan now seeks to create a meaningless distinction between her claims and Schumer's in order to further the government's, and her, interests.
>
> To give credence to Lujan's microscopically fine distinctions between her allegations and those of Schumer would do injustice to the purposes underlying the False Claims Act. It is the

> harbinger, not the mimic, who is entitled to champion the government's interests.

Therefore, the district court dismissed Lujan's qui tam claims, holding that the district court did not have jurisdiction to hear the case under § 3730(e)(4).

On appeal, we split Lujan's qui tam claims into two groups: pre and post-1986 conduct. *See United States ex rel. Lujan v. Hughes Aircraft Co. (Lujan II)*, 162 F.3d 1027, 1031 (9th Cir.1998). Following *Schumer*, we affirmed the district court's dismissal of Lujan's qui tam pre-1986 conduct claims, because the government already had knowledge of her claims.[7] *See id.* We reviewed the post-1986 conduct claims to determine if there was subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). We affirmed the district court's finding that *Lujan* and *Schumer's* allegations were substantially similar and therefore constituted "public disclosure" of Lujan's qui tam claims, stating:

> The subject matter of Schumer's action was four defense contracts between Hughes and the United States – the F-14D Program contract ("F14 contract"), the F-15 Radar Multistage Improvement Program Contract ("F15 contract"), the F-18 Radar Upgrade Program Contract ("F18 contract"), and the B-2 Special Programs Contract ("B-2 contract"). The B2 contract involved the design of an advanced radar system for that airplane. Hughes managed each of these contracts under "commonality agreements," which permit each program using a

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[7] Lujan admits that she met with Department of Defense representatives in 1988, three years before she filed her qui tam complaint. *See Lujan II*, 162 F.3d at 1031.

> common component to share in some portion of its development and production costs.
>
> Schumer alleged that Hughes used these commonality agreements to misbid, misallocate, and mischarge costs among the four contracts. For example, Schumer alleged that Hughes charged the development of a radar signal processor to the F15 contract but then also charged these developments costs to the F14, F18, and B2 contracts.
>
> Lujan's allegations also concern the contract to develop the B2 radar system. Lujan alleges that, between 1982 and at least 1989, Hughes routinely mischarged costs associated with the design and development of various B2 radar system contracts. She also alleges that Hughes mischarged costs on contracts involving the F14, F15, and F18 by means of the commonality agreements governing cost allocations among the various radar system programs.
>
> The Schumer and Lujan allegations both involve cost-sharing transactions among and within the radar system programs on four aircraft. The two claims involve the same commonality agreements and the same radar program contracts.

Lujan II, 162 F.3d at 1032-33. We then found that Lujan was an original source because she brought her allegations to the government before Schumer's allegations were publicly disclosed. Therefore, we reversed the district court's dismissal of Lujan's post-1986 claims, holding that the district court had subject matter jurisdiction under § 3730(e)(4)(A)'s "original source" exception.

On remand, Hughes moved to dismiss Lujan's qui tam action under the 31 U.S.C. § 3730(b)(5) first-to-file jurisdictional bar. The district court determined that *Lujan II* had not decided the § 3730(b)(5) issue, and then found that § 3730(b)(5) applied because *Schumer* was pending when Lujan filed her action. The district court reviewed (1) the prior district court findings that the allegations were substantially similar and "based upon" those publicly disclosed in Schumer's lawsuit and (2) our *Lujan II* upholding of that finding. The district court found that Lujan's claims were "based on" the same essential facts and raised the same issues as Schumer's claims, regardless of whether the two claims incorporated somewhat different details, and held that § 3730(b)(5) barred Lujan's case. Lujan appealed, contending that the district court improperly considered, interpreted, and applied § 3730(b)(5).

II. Jurisdiction and Standard of Review

We have jurisdiction under 28 U.S.C. § 1291. We review de novo a district court's legal determinations. *See United States v. Marbella*, 73 F.3d 1508, 1515 (9th Cir.1996). Dismissal for lack of subject matter jurisdiction is reviewed de novo, and the district court's relevant findings of fact are reviewed for clear error. *See United States ex rel. Aflatooni v. Kitsap Physicians Servs.*, 163 F.3d 516, 520-21 (9th Cir.1999).

III. Analysis

We first determine whether the district court had the power to decide the § 3730(b)(5) jurisdictional challenge.

Finding that the district court properly considered the issue, we then determine (1) the proper interpretation of § 3730(b)(5) and (2) if the district court properly applied § 3730(b)(5).

A. Law of the Case

Lujan contends that the law of the case doctrine precluded the district court's consideration of Hughes' § 3730(b)(5) jurisdictional challenge. We reject this contention.

The law of the case doctrine requires a district court to follow the appellate court's resolution of an issue of law in all subsequent proceedings in the same case. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir.1995). The doctrine does not apply to issues not addressed by the appellate court. *See id.* (quoting *Luckey v. Miller*, 929 F.2d 618, 621 (11th Cir.1991)). The doctrine applies to the appellate court's "explicit decisions as well as those issues decided by necessary implication." *Id.* (quoting *Eichman v. Fotomat Corp.*, 880 F.2d 149, 157 (9th Cir.1989)).

In *Lujan II*, we reversed the district court's dismissal of Lujan's post-1986 claims for lack of subject matter jurisdiction under § 3730(e)(4). While Hughes argued a § 3730(b)(5) jurisdictional challenge to this court, we did not explicitly or implicitly decide that issue. Therefore, the law of the case did not foreclose consideration of the § 3730(b)(5) jurisdiction issue. Even if we had decided the § 3730(b)(5) jurisdictional question in Lujan's favor, we can correct that decision to prevent manifest injustice. *See Southwest Marine Inc. v. Danzig*, 217 F.3d 1128, 1136 (9th Cir.2000) ("prior decision should be followed unless . . . the decision is clearly erroneous and its

enforcement would work a manifest injustice") (internal quotations omitted).

B. First-to-File Bar

Lujan next contends that § 3730(b)(5) should not bar her case because (1) her action could benefit the U.S. Treasury, (2) she was an original source, (3) she had personal knowledge of specific mischarging, and (4) she informed the government of her allegations and facts before the *Schumer* action. We reject each contention, holding that § 3730(b)(5) does not provide for such exceptions.

Section 3730(b)(5) provides that "[w]hen a person brings a [qui tam action], no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." In interpreting this provision, we "look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy, to ascertain the intent of Congress." *United States v. Hockings*, 129 F.3d 1069, 1071 (9th Cir.1997) (quoting *Northwest Forest Res. Council v. Glickman*, 82 F.3d 825, 830 (9th Cir.1996)) (internal quotations omitted). If the statute is ambiguous, we consider the legislative history. *See id.* "If a legislative purpose is expressed in plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms. Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole." *United*

States v. Rutherford, 442 U.S. 544, 551-52, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979) (quotations and citations omitted).

Section 3730(b)(5)'s plain language unambiguously establishes a first-to-file bar, preventing successive plaintiffs from bringing related actions based on the same underlying facts.[8] Unlike § 3730(e)(4) (the public disclosure jurisdictional bar),[9] § 3730(b)(5)'s plain language does not contain exceptions. Moreover, an exception-free, first-to-file bar conforms with the dual purposes of the 1986 amendments: to promote incentives for whistleblowing insiders and prevent opportunistic successive plaintiffs. *See, e.g., United States ex rel. LaCorte v. SmithKline Beecham Clinical Lab., Inc.*, 149 F.3d 227, 233-34 (3d Cir.1998) (discussing legislative history). The first-filed claim provides the government notice of the essential facts of an alleged fraud, while the first-to-file bar stops repetitive claims. We reject Lujan's contentions because they would require this court to read exceptions into the statute's plain language.[10]

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[8] *See, e.g., United States ex rel. Merena v. SmithKline Beecham Clinical Lab., Inc.*, 205 F.3d 97, 102 (3d Cir.2000) ("first-to-file rule of section 3730(b)(5)"); *United States ex rel. Taxpayers Against Fraud v. Gen. Elec. Co.*, 41 F.3d 1032, 1035 (6th Cir.1994) ("Similarly, the relator must be a true 'whistleblower'; therefore, he is precluded from collecting a bounty . . . if someone else has filed the claim first."); *Erickson ex rel. United States v. Am. Inst. of Biological Sci.*, 716 F.Supp. 908, 918 (E.D.Va.1989) ("provision establishes a first in time rule").

[9] See *Lujan II* for a discussion of § 3730(e)(4). 162 F.3d at 1031-35.

[10] Even assuming that we were to read a "benefit to the Treasury" exception into the statute, Lujan's argument remains without merit. The government knew of Lujan's and Schumer's

C. Pending Action

Lujan argues that because Schumer's action was dismissed it cannot be a "pending" action under § 3730(b)(5).[11] Following § 3730(b)(5)'s plain language, Lujan's action is barred if she brought the claim while *Schumer* was pending. Schumer brought his action in 1989; Lujan brought her action in 1992. Even assuming that Schumer's whole action was dismissed in 1997, five years after Lujan filed her complaint, Schumer's action

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allegations, and conducted numerous audits between 1985 and 1991. The government declined to intervene in both suits, and concluded that it had *benefitted* from Hughes' use of the commonality agreements.

[11] Other circuits have not directly held whether a subsequently dismissed action remains a "pending" action under § 3730(b)(5). The Second Circuit addressed this issue in an unpublished opinion, *United States ex rel. Pentagen Technologies International, Ltd. v. CACI International Inc.*, 1999 WL 55259 (2d Cir.1999) ("Because [a person's] action, when filed, was based on the same facts underlying the then-pending *Pentagen V*, no federal district court had jurisdiction to entertain his claims."). A district court addressed the issue in dicta, *United States v. Crescent City E.M.S., Inc.*, 946 F.Supp. 447, 450 (E.D.La.1996) (Section 3730(b)(5) "served to bar [a person] from intervening against the defendants in the pending qui tam litigation, as well as from refiling against the defendants once [the case] was dismissed for lack of subject matter jurisdiction.").

Lujan cites *Drake v. Cheney*, 1992 WL 75018 (4th Cir.1992) (unpublished disposition) to support her contention that *Schumer* cannot be considered a pending case. *Drake* is not relevant for purposes of our inquiry. *Drake* is distinguishable, involving a different statute and actions filed by the same person.

should still be considered a "pending" action for purposes of § 3730(b)(5) because Schumer's action was pending when Lujan brought her claim. To hold that a later dismissed action was not a then-pending action would be contrary to the plain language of the statute and the legislative intent. *See Rutherford*, 442 U.S. at 551-52, 99 S.Ct. 2470. Dismissed or not, Schumer's action promptly alerted the government to the essential facts of a fraudulent scheme – thereby fulfilling a goal behind the first-to-file rule. Accordingly, we reject Lujan's argument and hold that *Schumer* was a "pending action" under § 3730(b)(5).

D. Material Facts Test

We must determine if *Lujan* is a "related action based on the facts underlying the pending action [*Schumer*]." § 3730(b)(5). Relying on a single sentence from the Senate Judiciary Report,[12] Lujan contends that we should use an identical, not material facts, test. We reject this contention.

Most of the few courts that have addressed § 3730(b)(5) have rejected an identical facts test. The

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[12] "Subsection (b)(5) of section 3730 further clarifies that only the Government may intervene in a qui tam action. While there are few known instances of multiple parties intervening in past qui tam cases, *United States v. Baker-Lockwood Manufacturing Co.*, 138 F.2d 48 (8th Cir.1943), the Committee wishes to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances." S.Rep. No. 345, at 25 (1986) *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290.

cases' common principle is that "section 3730(b)(5) precludes a subsequent relator's claim that alleges the defendant engaged in the same type of wrongdoing as that claimed in a prior action even if the allegations cover a different time period or location within a company." *United States ex rel. Capella v. United Technologies Corp.*, 1999 WL 464536, at *9 (D.Conn. June 3, 1999) (summarizing the tests used by other courts).[13] The Third Circuit, the only appellate court to discuss and apply § 3730(b)(5), rejected an identical facts test. *See LaCorte*, 149 F.3d at 233-34. We find the Third Circuit's reasoning persuasive.

Section 3730(b)(5)'s plain language refers to "related" not "identical" actions. Therefore, we need not review the legislative history. *See Hockings*, 129 F.3d at 1071. Even if

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[13] *See, e.g., Cooper, United States ex rel. v. Blue Cross & Blue Shield*, 19 F.3d 562, 567 (11th Cir.1994) (Once a qui tam "suit has been filed by a relator or by the government, all other suits against the same defendant based on the same type of conduct would be barred."); *Capella*, 1999 WL 464536, at *9 ("[S]ection 3730(b)(5) bars a later claim unless: (1) it alleges a different type of wrongdoing, based on different material facts than those alleged in the earlier suit; and (2) it gives rise to a separate recovery of actual damages by the government."); *Hyatt v. Northrop Corp.*, 883 F.Supp. 484, 485 n. 3 (C.D.Cal.1995) ("31 U.S.C. § 3730(b)(5) bars qui tam actions based on facts already the subject of earlier filed actions."); *Erickson*, 716 F.Supp. at 918 ("A subsequently filed qui tam suit may continue only to the extent that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to separate and distinct recovery by the government.").

In *United States ex rel. Dorsey v. Warren E. Smith Community Health/Mental Retardation & Substance Abuse Centers*, 1997 WL 381761 (E.D.Pa.1997), the district court applied an identical facts test. *LaCorte* implicitly overruled *Dorsey* when it applied an essential facts test.

the language were considered ambiguous, the single sentence from the legislative history does not compel a different result. Furthermore, an identical facts test would defeat the congressional objectives for the 1986 amendments: "adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own." *United States ex rel. Springfield Terminal Ry. v. Quinn*, 14 F.3d 645, 649 (D.C.Cir.1994). Limiting § 3730(b)(5) to only bar actions with identical facts would be contrary to the plain language and legislative intent: (1) using a narrow jurisdictional bar, such as an identical facts test, would decrease incentives to promptly bring qui tam actions; (2) multiple relators would expect a recovery for the same conduct, thereby decreasing the total amount each relator would potentially receive and incentives to bring the suit; and (3) a narrow identical facts bar would encourage piggyback claims, which would have no additional benefit for the government, "since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds." *LaCorte*, 149 F.3d at 234.

Therefore, we hold that § 3730(b)(5) bars later-filed actions alleging the same material elements of fraud described in an earlier suit, regardless of whether the allegations incorporate somewhat different details.

E. Related Action Based on the Facts Underlying the Pending Action

Finally, Lujan contends that the district court erred in relying on our prior § 3730(e)(4) factual determination

that *Lujan* was "substantially similar" to and "based upon" *Schumer* to dismiss Lujan's action under § 3730(b)(5). We reject this contention.

While the factual determinations under § 3730(e)(4) (substantially similar) may be different than those under § 3730(b)(5) (same material facts), the district court was bound by the prior factual determinations to the extent that it could not contradict them. *See, e.g., United States v. Houser*, 804 F.2d 565, 567-68 (9th Cir.1986) (for the law of the case doctrine to apply the issue in question must have been decided in the previous disposition). The district court reviewed the prior factual analyses and determined that the analyses demonstrated that Lujan's claim encompassed the same material facts as Schumer's.

Lujan also contends that the district court impermissibly equated facts with allegations, and that § 3730(b)(5) requires an analysis of *Lujan* and *Schumer's* facts, not their allegations. We reject this contention. In motions to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the reviewing court must accept as true the allegations of the complaint. *See Miranda v. Reno*, 238 F.3d 1156, 1157 n. 1 (9th Cir.2001). For purposes of this inquiry, there is no difference between allegations and the underlying facts.

Given the prior factual determinations and conclusions, the district court did not clearly err in determining that Lujan's claim was "based on" the same material facts as Schumer's.

AFFIRMED.

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, ex rel.
Linda A. Lujan, Plaintif-Appellant,
v.
HUGES AIRCRAFT COMPANY, Defendant-Appellee.
No. 96-56228.
Argued and Submitted Nov. 6, 1997.
Decided Dec. 11, 1998.

Daniel I. Davidson, Spiegel & McDarmid, Washington, D.C., for the plaintiff-appellant.

Mark R. Troy, Michael Rizzo, McKenna & Cuneo, L.L.P., Los Angeles, California, for the defendant-appellee.

Appeal from the United States District Court for the Central District of California James M. Ideman, District Judge, Presiding. D.C. No. CV-92-01282- JMI.

Before: *William C. Canby, Jr.* and *David R. Thompson*, Circuit Judges, and *Donald W. Molloy*,* District Judge.

MOLLOY, District Judge:

Relator Linda A. Lujan brought *qui tam* and retaliation claims under the False Claims Act, 31 U.S.C.A. §§ 3729-3733 (West 1984 & Supp.1998) ("FCA"), against her former employer, Hughes Aircraft Company ("Hughes"). The *qui tam* provision of the FCA permits, in certain circumstances, suits by private parties on behalf of the United States against anyone submitting a false claim to the government. Lujan alleges that Hughes submitted fraudulent claims to the government during its

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* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

participation as a defense subcontractor in the B2 bomber and other projects between 1982 and 1989. The district court dismissed both the *qui tam* claims for lack of subject matter jurisdiction and the retaliation claims as time-barred by the statute of limitations. Lujan appeals. We affirm in part and reverse in part the dismissal of the *qui tam* claims and affirm the dismissal of the retaliation claims.

I
BACKGROUND

A. Factual Background

After being awarded a defense contract from the Air Force to construct the B-2 bomber, the Northrup Corporation awarded Hughes a "cost-plus" subcontract to develop the B-2's radar system. Several months later, Hughes was awarded other "fixed-price" contracts for developing radar systems for other aircraft, including the F-15 fighter aircraft. Because these contracts overlapped significantly, Hughes adopted "commonality agreements" that allowed it to allocate costs between the various contracts that were using common components.

Appellant Lujan was employed in Hughes' Radar Systems Group from 1982 to 1989. In early 1988, Lujan alleges, she began noticing that Hughes was engaging in fraudulent contracting practices by shifting costs from the fixed-price programs to the cost-plus programs. She reported these practices to her superiors at Hughes in February 1988, eventually discussing her concerns with Department of Defense representatives in June 1988.

Lujan alleges that, in response to her complaints, Hughes segregated her from her co-workers, ostracized and intimidated her, discriminated against her, and caused her physical and mental distress. In June 1989, Hughes fired Lujan. In February 1992, Lujan filed her first complaint, alleging both *qui tam* claims for Hughes' alleged fraud and retaliation claims for her termination.

During Lujan's tenure at Hughes, in January 1989, another Hughes employee, William J. Schumer, commenced a *qui tam* action against Hughes, alleging that Hughes had mischarged the government for certain radar development costs that should have been allocated to its fixed-price contracts instead of to the cost-plus B-2 contract. Schumer's case eventually made its way to the Supreme Court, which held in 1997 that Schumer's *qui tam* claims were jurisdictionally barred. *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997).

B. Procedural Background of *Lujan*

This is the second appeal in this case. In the first appeal, we decided the district court had erred in imposing the sanction of automatic dismissal for Lujan's violation of the FCA requirement that a *qui tam* claim remain under seal for at least 60 days. *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 243 (9th Cir.1995). We held that the sanction of dismissal was unwarranted under the circumstances and remanded the case to district court. *Id.* at 245-48.

We asked the district court on remand to consider the issue of jurisdiction pursuant to the 1986 version of 31

U.S.C. § 3730(e)(4)(A), which bars any *qui tam* action based on allegations already "publicly disclosed" unless the relator is the "original source" of the information. *Id.* at 248. We noted that Lujan's complaint resembled the earlier *qui tam* action brought in 1989 by Hughes employee William Schumer. *Id.* (referring to *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir.1995)).[1] We asked the district court as part of its jurisdictional determination to make factual findings on whether the allegations in Lujan's complaint were publicly disclosed by the civil proceedings in *Schumer.* 67 F.3d at 248.

Analyzing Lujan's allegations in her First Amended Complaint, the district court on remand determined that Lujan's allegations were "substantially similar" to Schumer's previous claims. Order, Mar. 19, 1996, at 5. The district court concluded that Lujan was trying "to create a meaningless distinction between her claims and Schumer's in order to establish jurisdiction" and that the difference between the Lujan and Schumer allegations was "microscopically fine." *Id.* at 5-6. Concluding that "[i]t is the harbinger, not the mimic, who is entitled to champion the government's interests," *id.*, the court dismissed Lujan's *qui tam* claims.

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[1] As discussed above, the Supreme Court reviewed *Schumer* and held that the 1982 version of the FCA governed Schumer's claims and that Schumer's *qui tam* claims should have been dismissed. *Hughes Aircraft Co. v. United States ex rel. Schumer,* 520 U.S. 939, 117 S.Ct. 1871, 1879, 138 L.Ed.2d 135 (1997).

In April 1996, Lujan moved for reconsideration in the district court, arguing that she was an original source of the public disclosures in this case. The district court denied the motion. In June 1996, the district court granted Hughes' motion to dismiss Lujan's remaining retaliation claims as time barred by the state's one-year statute of limitations.

II

A. Standard of Review

We review de novo a district court's dismissal for lack of subject matter jurisdiction. *Ma v. Reno*, 114 F.3d 128, 130 (9th Cir.1997); *Evans v. Chater*, 110 F.3d 1480, 1481 (9th Cir.1997). However, a district court's factual findings on all jurisdictional issues must be accepted unless clearly erroneous. *Adler v. Federal Rep. of Nigeria*, 107 F.3d 720, 729 (9th Cir.1997). We will not disturb a district court's findings of fact unless we are left with a definite and firm conviction that a mistake has been made. *Committee for Idaho's High Desert, Inc. v. Yost*, 92 F.3d 814, 819 (9th Cir.1996).

B. Pre-1986 Conduct

The first question we must decide is whether the 1986 amendments to the FCA apply retroactively to Hughes' pre-1986 misconduct. This question leads us to the *Schumer* case. *Schumer* is important to Lujan's case not only because Schumer was a Hughes employee whose prior claims directly affect the status of Lujan's claims

factually but also because the Supreme Court's interpretation of the FCA in *Schumer* controls this case.

Similar to the issue in the instant case, the issue in *Schumer* was whether the 1986 amendments to the FCA apply retroactively to pre-1986 conduct. *Schumer,* 117 S.Ct. at 1875. The distinction between the 1982 and 1986 versions of the FCA is significant because, as we noted when *Schumer* was before us, "[w]hereas the pre-1986 Act barred cases brought by *qui tam* plaintiffs when their allegations were 'based on evidence or information the Government had when the action was brought,' the 1986 amendments narrowed this bar to the more limited class of cases based on information previously disclosed to the public." *Schumer,* 63 F.3d at 1517 (internal citations omitted).

Concluding that Congress did not intend to apply the 1986 amendments retroactively, the Supreme Court held that the 1982 version of the FCA should be applied to any conduct alleged by Schumer that occurred prior to the 1986 version's effective date. *Schumer,* 117 S.Ct. at 1876. Because the government knew about the alleged misconduct before Schumer filed his claim, the Court held that the 1982 version of the FCA required the dismissal of Schumer's *qui tam* claims. *Id.* at 1879.

The Supreme Court in *Schumer* found it unnecessary to decide whether the relevant conduct for purposes of non-retroactivity was the act of Hughes in presenting a false claim, or the public disclosure of that fact. *See Schumer,* 117 S.Ct. at 1876 n. 4. In our case, we must decide that issue because it appears that some of the allegedly actionable conduct occurred before 1986 but

was disclosed after 1986. We conclude that the crucial event for purposes of non-retroactivity is the alleged presentation by Hughes of a false claim, and not the public disclosure of that conduct. The considerations of fairness underlying the presumption against retroactivity militate in favor of that conclusion. The act upon which liability is founded is the presentation of a false claim to the government. It is that conduct for which the 1986 amendment "essentially creates a new cause of action" by eliminating a defense. *Schumer,* 117 S.Ct. at 1878. The unfairness of retroactivity would be to render Hughes subject to a cause of action that did not exist at the time it engaged in the conduct later made actionable. *Cf. Schumer,* 117 S.Ct. at 1876-78. We conclude, therefore, that the 1986 amendment applies to the presentation of false claims after its effective date. Accordingly, we apply the 1982 version of the FCA to all false claims allegedly presented by Hughes before the effective date of the 1986 amendments.

The 1982 version of the FCA provides that "the court shall dismiss an action . . . on discovering the action is based on evidence or information the Government had when the action was brought." 31 U.S.C.A. § 3730(b)(4) (West 1983). Here, Lujan freely admits that, because she was dissatisfied with Hughes' internal investigation of her complaints of serious mischarging to the B-2 bomber program, she "met with representatives of the department of Defense [in June of 1988] to inform them of [her] charges." Lujan Affidavit at 2. Lujan did not file her *qui tam* complaint until February 28, 1992, almost three years after her initial disclosures.

Thus, in considering Lujan's pre-1986 claims, we need not determine whether the government gained its information from Schumer's earlier allegations. Lujan's own admissions show that the government possessed the information that Lujan alleged in her complaint before she filed that complaint. Applying the 1982 version of the FCA, we therefore affirm the district court's dismissal of Lujan's *qui tam* claims that are based on Hughes' pre-1986 conduct.

C. Post-1986 Conduct

1. The 1986 False Claims Act Standard

The next issue we must address is whether a different standard applies to the analysis of Hughes' post-1986 conduct. The Supreme Court in *Schumer* specifically stated that the false claims alleged by Schumer were submitted to the government between 1982 and 1984, *Schumer,* 117 S.Ct. at 1875, and that Hughes' alleged false charges occurred before 1986. *Id.* at 1876 n. 4. By contrast, Lujan alleges that Hughes mischarged the government from 1982 through 1989. Because the district court in Lujan's case did not make specific findings as to the individual dates of the alleged presentation of false claims, we must assume that some of the alleged presentation of false claims occurred after 1986. Accordingly, we must determine whether Lujan's post-1986 allegations are jurisdictionally barred by the 1986 version of the FCA, which provides:

> No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a

> congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

31 U.S.C.A. § 3730(e)(4)(A) (West Supp.1998).[2]

In subsection (B), the statute next defines "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information." 31 U.S.C.A. § 3730(e)(4)(B) (West Supp.1998). Thus, as the Supreme Court noted in *Schumer*, the 1986 amendments allow "*qui tam* suits based on information in the Government's possession, except where the suit was based on information that had been publicly disclosed and was not brought by an original source of the information." *Schumer*, 117 S.Ct. at 1876.

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[2] Although section 3730(e)(4)(A) refers to "an action under this section based upon the public disclosure," a common sense reading has been accorded to these words. The action is based not on the disclosure, but on the underlying "information that had been publicly disclosed." *Schumer*, 117 S.Ct. at 1876; *see United States ex rel. Biddle v. Board of Trustees of Stanford Univ.*, 147 F.3d 821, 826 (9th Cir.1998) ("[A] claim is 'based upon' public disclosure when the claim repeats allegations that have already been disclosed to the public").

2. Public Disclosure by Schumer's Allegations

The first issue we must resolve in analyzing the jurisdictional status of Lujan's post-1986 allegations is whether Schumer's earlier allegations constituted "public disclosure" of the misconduct underlying Lujan's complaint. In other words, if Lujan's allegations are substantially similar to Schumer's, then the wrongdoing was publicly disclosed and Lujan's *qui tam* claims must be dismissed unless Lujan is an original source of the information. As set forth above, we review the district court's factual findings for clear error. *Adler*, 107 F.3d at 729. However, even if we were to review the district court's comparison of Lujan's and Schumer's complaints de novo (the district court conducted no factual inquiry beyond an examination of the complaints and the record), we would affirm the district court's determination that the allegations are substantially similar.

The record supports this conclusion. The subject matter of Schumer's action was four defense contracts between Hughes and the United States – the F-14D Program contract ("F14 contract"), the F-15 Radar Multistage Improvement Program Contract ("F15 contract"), the F-18 Radar Upgrade Program Contract ("F18 contract"), and the B-2 Special Programs Contract ("B-2 contract"). The B2 contract involved the design of an advanced radar system for that airplane. Hughes managed each of these contracts under "commonality agreements," which permit each program using a common component to share in some portion of its development and production costs.

Schumer alleged that Hughes used these commonality agreements to misbid, misallocate, and mischarge

costs among the four contracts. For example, Schumer alleged that Hughes charged the development of a radar signal processor to the F15 contract but then also charged these developments costs to the F14, F18, and B2 contracts.

Lujan's allegations also concern the contract to develop the B2 radar system. Lujan alleges that, between 1982 and at least 1989, Hughes routinely mischarged costs associated with the design and development of various B2 radar system contracts. She also alleges that Hughes mischarged costs on contracts involving the F14, F15, and F18 by means of the commonality agreements governing cost allocations among the various radar system programs.

The Schumer and Lujan allegations both involve cost-sharing transactions among and within the radar system programs on four aircraft. The two claims involve the same commonality agreements and the same radar program contracts. In sum, we agree with the district court that Lujan's allegations are substantially similar to those disclosed in the earlier *Schumer* action, thereby constituting "public disclosure" of Lujan's *qui tam* claims within the meaning of the 1986 version of the False Claims Act.

3. Lujan as an "Original Source"

However, even if Schumer's allegations are sufficiently similar to Lujan's to constitute public disclosure of Lujan's allegations, jurisdiction over Lujan's *qui tam* claims is not necessarily destroyed. As set forth above, public disclosure is fatal to jurisdiction only if Lujan is

not an original source of the allegations. 31 U.S.C.A. § 3730(e)(4)(A) (West Supp.1998).

To qualify as an original source, "a relator must show that he or she has 'direct and independent knowledge of the information on which the allegations are based,' 'voluntarily provided the information to the government before filing his or her *qui tam* action,' and 'had a hand in the public disclosure of allegations that are a part of . . . [the] suit.' " *United States ex rel. Devlin v. State of California*, 84 F.3d 358, 360 n. 3 (9th Cir.1996) (quoting *Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir.1992)).

We have already noted that Lujan voluntarily provided the information to the government before filing her suit: She met and discussed her allegations with Department of Defense personnel on June 6, 1998. As the district court noted, the parties do not dispute that Lujan has direct and independent knowledge of her allegations. Order Dismissing Relator's *Qui Tam* Counts, at 3 n. 2. These two factors alone, however, do not establish original source status.

In *Wang*, we held that, "to bring a *qui tam* suit based on allegations already in the public domain . . . a plaintiff [must] have played a part in disclosing those allegations." *Wang*, 975 F.2d at 1414. Wang had direct knowledge in May 1983 of possible fraud by his employer, FMC Corporation, involving a transmission problem on the Bradley rocket launcher. FMC fired Wang in December 1986, and Wang filed his False Claims Act case in December 1987. *Id.* at 1417-18. However, before he filed suit, various newspapers reported the Bradley's transmission problems. *Id.* at 1417. We then observed that "Wang is

now revealing what is already publicly known." *Id.* at 1418. Wang had known of the Bradley problems since 1983, yet he "sat quietly in the shadows and breathed not a word about them until he was fired," *id.* at 1419-20, while "some other conscientious or enterprising person bravely brought the transmission problems to the attention of the media and Army," *id.* at 1420. Because Wang had merely republished an allegation that had already been publicly disclosed, we concluded that Wang was not an original source. *Id.* at 1419.

Paraphrasing *Wang*, the district court in Lujan's case concluded that Lujan had merely "echoed" Schumer's allegations and was, therefore, not an original source. We disagree with the district court's application of *Wang* to the facts of this case. Like Wang, Lujan has direct and independent knowledge of the information underlying her allegations. But, unlike Wang, she did not remain silent and wait until after she was fired to take that information to the government. Instead, she took her allegations to the government in June 1988, before Schumer filed his action in 1989 and well before Lujan filed her original complaint in 1992.

In *Wang*, we noted that Congress's intent in protecting original sources was to "bring the wrongdoing to light" at the earliest possible opportunity. *Id.* at 1419. Crucial to the instant opinion, however, we stated the following in *Wang*:

> It is important to note that under the rule we adopt today, *all* those who "directly or indirectly" disclose an allegation might qualify as its original source. Anyone who helped to report the allegation to either the government or the

> media would have "indirectly" helped to publicly disclose it.

Id. at 1419 (quoting *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir.1990)).

Lujan disclosed her allegations to the government before similar allegations were publicly disclosed by Schumer's lawsuit. Under the reasoning of *Wang*, Lujan "indirectly" publicly disclosed her allegations of fraud. She also acted promptly to remedy the perceived wrongdoing. Because the district court has subject matter jurisdiction under the "original source" exception to the 1986 FCA, we reverse the district court's dismissal of Lujan's post-1986 *qui tam* claims.

III

The Retaliation Claim

Lujan's complaint also includes a retaliation claim under another provision of the False Claims Act.[3] She

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[3] The retaliation provision of the FCA states:

> (h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but

alleges Hughes ostracized, harassed, and intimidated her because she reported her perceived discrepancies in Hughes' contracting and accounting procedures. The district court dismissed these claims as time-barred by the applicable one-year state statute of limitations. On appeal, Lujan argues that the district court should have applied the False Claim Act's six-year statute of limitations to her retaliation claims. We review de novo the district court's determination of the applicable statute of limitations, *Naas v. Stolman*, 130 F.3d 892 (9th Cir.1997), and we affirm.

The relevant section of the False Claims Act provides: "A civil action under section 3730 may not be brought . . . more than 6 years after the date *on which the violation of section 3729 is committed*. . . . " 31 U.S.C.A. § 3731(b)(1) (West Supp.1998) (emphasis added). Lujan urges us to read the statute plainly and to apply a six-year statute of limitations to all actions under section 3730, including her retaliation claim even though

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for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

31 U.S.C.A. § 3730(h) (West Supp. 1998).

retaliation does not constitute a violation of section 3729. The answer is not so simple.[4]

The False Claims Amendment Act of 1986, Pub.L. 99-562, 100 Stat. 3153, added the retaliation claim provisions at section 3730(h) and the statute of limitations for false claims provision at section 3731(b). Before 1986, section 3731(b) simply said that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C.A. § 3731(b) (West 1983). By implication, all claims had a six-year window of opportunity under the old law.

If Congress had wanted to retain a six-year statute for all actions under section 3730, including retaliation claims, it would have left the pre-1986 language of section 3731(b) intact when it enacted the 1986 amendments to the FCA. Instead, Congress, while adding a provision for retaliation claims under 3730(h), narrowed the application of the six-year statute of limitations to violations of section 3729. Section 3729 specifically and strictly addresses false claims, not retaliation claims.

That Congress was specifically concerned with false claims in its 1986 amendments to the statute of limitations is further illustrated by its addition of section 3731(b)(2). This section provides an alternative to the six-year statute of limitations for false claims, namely a period of no more than three years after material facts

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[4] In rejecting the applicability of the six-year statute to retaliation claims, we disagree with the Seventh Circuit in *Neal v. Honeywell, Inc.*, 33 F.3d 860, 865 (7th Cir.1994) (applying six-year statute for violation of section 3729 to all claims under section 3730).

should have been known by the relevant government official, but never longer than ten years after the violation was committed. 31 U.S.C.A. 3731(b) (West Supp.1998). The legislative history to this section indicates that this change was enacted to "ensure the Government's rights are not lost through a wrongdoer's successful deception," because "fraud is, by nature, deceptive. . . . " S.Rep. No. 99-345, at 15 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5280.

The same rationale is inapposite to a private claim for retaliation. There is nothing covert or deceptive about retaliation-the victim feels its sting immediately. In the absence of some meaningful indication to the contrary, we must therefore presume that, in amending section 3731(b) so that the limitation runs only from the date of a violation of section 3729, Congress did not intend that the statute apply to section 3730(h).

Congress created the retaliation claim but provided no specific statute of limitations for such claims. The Supreme Court has held that when Congress does not supply an express statute of limitations governing a federal cause of action, then "Congress intended that the courts apply the most closely analogous statute of limitations under state law." *Reed v. United Transport Union*, 488 U.S. 319, 323, 109 S.Ct. 621, 102 L.Ed.2d 665, (1989).

We agree with the district court that the most analogous statute of limitations under California law is the one-year statute applicable to wrongful termination in violation of California public policy. *See*

Cal.Civ.Proc.Code § 340(3) (West Supp.1998). Accordingly, we affirm the district court's dismissal of Lujan's retaliation claim as time-barred.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

United States Court of Appeals,
Ninth Circuit.
UNITED STATES of America, ex rel., Plaintiff,
and
Linda A. LUJAN, Plaintiff-appellant,
v.
HUGHES AIRCRAFT CO., Defendant-Appellee.
No. 94-55153.
Argued and Submitted May 1, 1995.
Decided Sept. 29, 1995.

Daniel I. Davidson, Spiegel & McDiarmid, Washington, DC, for plaintiff-appellant.

Fred D. Heather, McKenna & Cuneo, Los Angeles, California, for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before: FLETCHER, *BRUNETTI*, and *T.G. NELSON*, Circuit Judges.

BRUNETTI, Circuit Judge:

Linda Lujan appeals the dismissal of her *qui tam* and retaliation claims brought pursuant to the False Claims Act, 31 U.S.C. § 3729 *et seq.* (1983 & Supp.1994) (FCA), against her former employer, Hughes Aircraft Company. The district court dismissed Lujan's complaint because Lujan disclosed the nature and existence of her *qui tam* claim to the *Los Angeles Times* while the complaint was still under seal pursuant to § 3730(b)(2). We have jurisdiction, *see* 28 U.S.C. § 1291, and reverse.

I.

On February 28, 1992, Lujan brought a *qui tam* action against Hughes under the False Claims Act. Pursuant to § 3730(b)(2), Lujan filed her claim *in camera*, and served it on the Government along with the requisite written disclosure of information. The complaint alleged that Hughes had mischarged the Government for its work on the B-2 radar systems. Lujan's complaint also contained a second cause of action alleging wrongful discrimination and retaliatory termination under § 3730(h).

Prior to filing her *qui tam* claim, Lujan had made similar allegations of improper conduct by Hughes in a wrongful termination suit and in a workers' compensation action. On December 16, 1991, over ten weeks before the filing of her *qui tam* complaint, Lujan was deposed in connection with her wrongful termination suit. During Lujan's deposition, Hughes' attorney, Mr. Stockman, questioned Lujan extensively about the basis of her forthcoming *qui tam* claim and its relationship to the allegations of her wrongful termination claim. For example, Hughes' attorney justified one question about her *qui tam* claim by arguing that his question was relevant "because it is reasonably calculated to lead to the discovery of admissible evidence, in that she is basing her *qui tam* action to a large extent upon the same facts that she is basing this action."

On April 3, 1992, after she had filed her *qui tam* claim and while it was still under seal, but before Hughes had been served with the complaint, an article appeared in the *Los Angeles Times*. The article reported that Lujan had filed a *qui tam* claim and disclosed the existence and

general nature of allegations contained in her complaint. Specifically, the article stated that "Hughes allegedly inflated its profits by billing costs on jet fighter radar programs to the B-2 contract and shifting costs between different phases of the program[.]"

A few weeks later, a companion story appeared in the *Times*. The second article again recited the facts of Lujan's suit and quoted Mr. Tom Peirce, a former Hughes' ethics administrator who claimed to have investigated Lujan's allegations. The article noted that "[Hughes] officials are aware of Lujan's general allegations, because they resemble those made in a 1989 suit filed by William Schumer, the former Hughes director of contracts for the B-2."

Following the appearance of the second newspaper article, Hughes filed under seal a motion to dismiss the complaint for failure to comply with the seal provision. The court continued the hearing until after service of the complaint on Hughes.

Lujan then filed under seal a First Amended Complaint. Pursuant to 31 U.S.C. § 3730(b)(3) & (4)[1] the

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[1] Section 3730(b) provides in pertinent part:

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal[.] . . .

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

Government obtained extensions of the seal beyond the date originally set by the court. Upon completion of its investigation of Lujan's *qui tam* claims, the Government notified the court that it would not intervene. On April 23, 1993, the district court ordered that the seal be lifted and the complaint be served on Hughes. Subsequently, Hughes filed a second notice of hearing in connection with its previously filed motion to dismiss. The district court granted Hughes' motion, and Lujan timely appeals.

II.

Lujan clearly violated the seal provision of 31 U.S.C. § 3730(b)(2)[2] by making statements to the *Los Angeles Times* about the existence and nature of her *qui tam* suit. Any suggestion that her disclosure to a major newspaper is not a violation of the seal provision cannot be taken seriously. The critical issue we must consider is whether dismissal of Lujan's *qui tam* action is the appropriate remedy for that violation.

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[2] Section 3730(b)(2) provides:

> A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

The district court did not explain on what authority it rested its decision to dismiss. There are only two possible sources for authority on which the district court could have relied: the False Claims Act, or the district court's inherent power to dismiss as a sanction. We address these issues in turn.

A. Statutory Basis for Dismissal

We review the district court's interpretation of the FCA *de novo*. *See Stephens v. City of Vista*, 994 F.2d 650, 655 (9th Cir.1993).

No provision of the False Claims Act explicitly authorizes dismissal as a sanction for disclosures in violation of the seal requirement. Hughes contends, and the district court seems to have decided, that the authorization for dismissal of complaints is implicit in the purpose of the seal requirement. We find that the district court's analysis of the purpose of the seal was erroneous. Consequently, its dismissal of Lujan's complaint cannot be justified by reliance on the FCA.

By providing for the seal provision, Congress intended to strike a balance between "the purposes of *qui tam* actions [and] . . . law enforcement needs [.]" S.Rep. No. 345, 99th Cong., 2d Sess. 24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289. The purpose of *qui tam* actions is to encourage more private false claims litigation. *See id.*, *reprinted in* 1986 U.S.C.C.A.N. at 5288. The other side of the balance recognizes the need to allow the Government an adequate opportunity to fully evaluate the private enforcement suit and determine both if that suit involves matters the Government is already investigating and

whether it is in the Government's interest to intervene and take over the civil action.

Id., reprinted in 1986 U.S.C.C.A.N. at 5289. The seal provision provides an appropriate balance between these two purposes by allowing the *qui tam* relator to start the judicial wheels in motion and protect his litigative rights, while allowing the government the opportunity to study and evaluate the relator's information for possible intervention in the *qui tam* action or in relation to an overlapping criminal investigation. *Id.*

When the seal provisions are violated, this balance cannot be disregarded. The requirements of § 3730(b)(2) are not jurisdictional, and violation of those requirements does not *per se* require dismissal of the *qui tam* complaint. *See United States ex rel. Pilon v. Martin Marietta Corp.*, 60 F.3d 995, 1000 (2d Cir.1995) (expressing reluctance to rule that the requirements of § 3730(b)(2) are jurisdictional). Rather, the district court must keep in mind *both* sides of the balance when constructing a sanction for a violation of the seal provision. In this case, when the district court sanctioned Lujan for violating the seal provision, it failed to consider this balance and instead concluded *ipso facto* that once a violation was found, dismissal was appropriate. Several factors should have given the district court reason to pause before deciding dismissal was appropriate.

First, the district court failed to consider whether the Government was actually harmed by Lujan's disclosure. Courts that have previously addressed this issue and found dismissal appropriate have relied, at least in part, on the irreparable harm to the government caused by the

complete failure to abide by any of the seal provisions, including failure to serve the government with a copy of the complaint. In *Pilon*, the court found that the violation "incurably frustrated the statutory purposes underlying [the seal] requirements[.]" *Id.* at 996. Similarly, in *Erickson ex rel. United States v. American Inst. of Bio. Sciences*, 716 F.Supp. 908 (E.D.Va.1989), the court rested its holding on its finding that "Erickson's failure to comply with the filing and service provisions *irreversibly frustrates* the congressional goals underlying those provisions." *Id.* at 912 (emphasis added).

The mere possibility that the Government *might* have been harmed by disclosure is not alone enough reason to justify dismissal of the entire action. The district court should have assessed whether and to what extent the government was harmed before sanctioning Lujan with dismissal.

We have reason to doubt whether the Government actually suffered any harm in this case. Both parties refer in their briefs to Hughes' deposition of Lujan in her state court proceedings; the deposition took place before her *qui tam* case was filed and before any seal existed. The deposition transcript excerpts presented by Lujan indicate Hughes was aware of Lujan's intent to file a *qui tam* action and of the nature of her allegations. In light of the fact that Lujan's disclosure to the *Times* gave only general descriptions of her claims in contrast to the very detailed answers Lujan gave Hughes' attorney during her deposition, there is a strong inference that Hughes did not learn anything from the *Times* articles that it did not already know. If Hughes learned nothing from the *Times* articles, then the articles alone could not have prompted any

action by Hughes, and the Government's investigation could not have been hampered by the articles. *But see Pilon*, 60 F.3d at 999 ("That the government and Defendants may have been aware of the substance of the Pilons' allegations does not diminish the consequences of the Pilons' failure to comply with the statutory requirements.").

Although we are inclined to think that the articles did not harm the Government's investigation, we are not in a position to draw any final conclusion from this record. The district court will have to make the final determination on remand.

In making its determination, the district court will have to consider the Statement of the United States Regarding Defendant's Motion to Dismiss the Complaint, which stated:

> [W]hile the United States has not claimed in this case that it was prejudiced by the public disclosure of the *qui tam* allegations prior to the lifting of the seal, it is not in a position to state[,] as a factual matter, that it was not prejudiced by such disclosure. It is difficult, if not impossible, to determine what actions may have been taken by the defendant based upon its knowledge of the investigation.

As this Statement indicates, it would be impossible to determine what actions Hughes might have taken when it originally learned of Lujan's *qui tam* action. However, if Hughes' knowledge of the investigation pre-dated Lujan's breach of the seal, and was in no way enhanced by Lujan's disclosure to the *Times*, then it would be illogical to assume that Hughes took any actions based on

the *Times* articles. The district court will have to evaluate the Government's Statement in light of Hughes' pre-filing knowledge of the claim.

A second factor the district court must weigh against congressional intent to promote litigation through *qui tam* claims is the nature of the violation. Lujan violated § 3730(b)(2) by disclosing the existence and nature of her *qui tam* complaint in very general terms to the *Los Angeles Times*. Lujan complied with all the other requirements of § 3730(b)(2) by filing her complaint *in camera* and serving it on the Government along with a written disclosure of information. The violation of the seal provision in this case is qualitatively different than the violations in cases that have found dismissal was an appropriate sanction. For example, in *Erickson*, the relator *completely* failed to comply with *any* of the requirements of § 3730(b)(2). *Erickson*, 716 F.Supp. at 911. Similarly, in *Pilon*, counsel failed to file the complaint *in camera*, failed to serve the United States with a copy of the complaint and a written disclosure of the underlying evidence, and, several hours after filing, arranged for an extensive interview with a reporter. *Pilon*, 60 F.3d at 997. When evaluating the appropriate sanctions, the district court cannot disregard the relative severity of the violation.

A third factor to be weighed in determining whether dismissal is appropriate is the presence or absence of bad faith or willfulness. In this case there is no finding that Lujan's disclosure was made in bad faith. In fact, nothing in the record indicates whether the disclosures occurred. The only evidence we find are the articles themselves, which merely indicate Lujan and her attorney "said" certain things. It may be logical in this case to infer that

Lujan willfully breached the seal provisions, especially in the absence of any representation to the contrary. However, in other cases, when the presence or absence of bad faith or willfulness cannot be inferred, district courts must inquire into those matters in order to make an informed determination of whether dismissal is warranted, or whether some lesser sanction is sufficient. *See Pilon*, 60 F.3d at 999 ("The record reveals . . . a considerable lack of good faith.").

Before concluding, we address one factor relied on by the district court that is not one of the statutory purposes of the seal provision, and therefore is not relevant in determining whether a particular seal violation warrants dismissal under the FCA. The district court based its decision in part on its inference that Congress enacted the seal provision to "protect[ ] defendants from damaging attacks to which they are unable to respond." This analysis is erroneous.

The Committee's only documented concern regarding defendants' interests was that it avoid the pre-amendment possibility that defendants might be required to answer a complaint two days after service, without knowing whether its opponent would be the Government or a private litigant.[3] S.Rep. No. 345, 99th Cong., 2d Sess. 24, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289. This was the only interest to which the Committee referred when it commented that "sealing the initial private civil false

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[3] As amended, § 3730(b)(3) provides that "[t]he defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant. . . . "

claims complaint protects both the Government and the defendant's interests without harming those of the private relator." *Id.* Never did the Committee discuss, let alone imply that it sought to protect, the types of potential unfairness relied on by Hughes and the district court. To the contrary, the Committee explicitly stated that "[b]y providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way." *Id.* For these reasons, protecting the rights of defendants is not an appropriate consideration when evaluating the appropriate sanction for a violation of the seal provision.[4]

Our holding today will require district courts to explore the facts underlying violations of the seal requirements before concluding that the extreme sanction of dismissal is warranted. However, the findings we require district courts to make are no more onerous than those required when district courts dismiss under their inherent powers. More importantly, those findings are necessary to give full effect to the balance Congress sought to strike when it enacted the seal provisions.

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[4] We do not mean to imply that harm to the defendant is never a relevant consideration when district courts are assessing possible sanctions for failure to comply with seal requirements. As discussed below, harm to the defendant is an appropriate consideration when the district court dismisses under its inherent powers. *See infra* II.B. We simply find that there is no support either in the text or the legislative history to find that it was one of the interests Congress sought to protect. *Accord Pilon*, 60 F.3d at 999 (suggesting that "other interests not addressed by [the] legislative history" include "a defendant's reputation[.]").

B. Dismissal as an Exercise of Inherent Powers

We now consider whether the district court's dismissal of Lujan's complaint can be justified as a proper exercise of its inherent power to sanction. *See Halaco Engineering Co. v. Costle*, 843 F.2d 376, 380 (9th Cir.1988). Imposition of dismissal as a sanction is reviewed for abuse of discretion. *Id.* at 379. Factual findings upon which the district court relied are reviewed for clear error. *Id.*

Although district courts have the inherent power to dismiss an action as a sanction, in so doing the court must consider the following:

> (1) the existence of certain extraordinary circumstances, (2) the presence of willfulness, bad faith, or fault by the offending party, (3) the efficacy of lesser sanctions, (4) the relationship or nexus between the misconduct drawing the dismissal sanction and the matters in controversy in the case, and finally, as optional considerations where appropriate, (5) the prejudice to the party victim of the misconduct, and (6) the government interests at stake.

Id. at 380. We need not address all of these factors, because the district court failed to explicitly consider the possibility of lesser sanctions. To satisfy this requirement, the district court had to provide a reasonable explanation of possible and meaningful alternatives. *See id.* at 381. Failure to *explicitly consider* less drastic sanctions is a fatal flaw in the district court's decision to dismiss as a sanction, and consequently, its decision cannot be viewed as a

proper exercise of its inherent power to dismiss as a sanction.[5] *See id.*

III.

On remand, before it can reach the merits of Lujan's claims, the district court will also have to consider whether it has jurisdiction. *See Wang v. FMC Corp.*, 975 F.2d 1412, 1415 (9th Cir.1992).

Section 3730(e)(4)(A) of the False Claims Act circumscribes district courts' jurisdiction in *qui tam* actions by barring suits brought after the allegations in the complaint have been publicly disclosed, unless the relator is the "original source" of the information.[6] In other words,

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[5] Since we hold that dismissal of Lujan's entire complaint was inappropriate, we need not address Lujan's separate contention that dismissal of her personal claim pursuant to § 3730(h) was inappropriate.

[6] 31 U.S.C. § 3730(e)(4) specifically provides:

> (A) No court shall have jurisdiction over an action . . . based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

"[t]o bring a *qui tam* suit, one must have had a hand in the public disclosure of allegations that are a part of one's suit." *Wang*, 975 F.2d at 1418.

On appeal, it came to the attention of this court that the allegations in Lujan's complaint resemble the subject of an earlier *qui tam* brought in 1989 by William Schumer, the former Hughes director of contracts for the B-2. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir.1995). Whether the information in Lujan's complaint had already been publicly disclosed through Schumer's action depends on factual findings "that must be made by the district court in the first instance[.]" *United States v. Northrop Corp.*, 5 F.3d 407, 409 (9th Cir.1993), *cert. denied*, 511 U.S. 1033, 114 S.Ct. 1543, 128 L.Ed.2d 195 (1994). On remand, therefore, the district court must make the appropriate factual inquiry to determine whether the allegations in Lujan's complaint were publicly disclosed by Schumer.

IV.

The district court's dismissal of Lujan's complaint is REVERSED and the case is REMANDED for further proceeding in accord with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, ex rel. LINDA A. LUJAN, Plaintiffs-Appellants, v. HUGHES AIRCRAFT COMPANY, Defendant-Appellee.	No. 00-55328 D.C. No. CV-92-01282-SVW ORDER (Filed Jun. 5, 2001)

Before: LEAVY, TROTT, and SILVERMAN, Circuit Judges.

The panel has voted to deny appellants' petition for rehearing. Judges Trott and Silverman have voted to reject the petition for rehearing en banc and Judge Leavy so recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc are denied.

APPENDIX FALSE CLAIM ACT STATUTES

31 U.S.C.A. §§ 3729

UNITED STATES CODE ANNOTATED

TITLE 31. MONEY AND FINANCE

SUBTITLE III - FINANCIAL MANAGEMENT

CHAPTER 37 - CLAIMS

SUBCHAPTER III - CLAIMS AGAINST THE UNITED STATES GOVERNMENT

Current through P.L. 107-11, approved 5-28-01

§§ 3729. False claims

(a) Liability for certain acts. - Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, except that if the court finds that –

(A) the person committing the violation of this subsection furnished officials of the United States responsible for investigating false claims violations with all information known to such person about the violation within 30 days after the date on which the defendant first obtained the information;

(B) such person fully cooperated with any Government investigation of such violation; and

(C) at the time such person furnished the United States with the information about the violation, no criminal prosecution, civil action, or administrative action had commenced under this title with respect to such violation, and the person did not have actual knowledge of the

existence of an investigation into such violation; the court may assess not less than 2 times the amount of damages which the Government sustains because of the act of the person. A person violating this subsection shall also be liable to the United States Government for the costs of a civil action brought to recover any such penalty or damages.

(b) Knowing and knowingly defined. – For purposes of this section, the terms "knowing" and "knowingly" mean that a person, with respect to information –

(1) has actual knowledge of the information;

(2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information, and no proof of specific intent to defraud is required.

(c) Claim defined. – For purposes of this section, "claim" includes any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded, or if the Government will reimburse such contractor, grantee, or other recipient for any portion of the money or property which is requested or demanded.

(d) Exemption from disclosure. – Any information furnished pursuant to subparagraphs (A) through (C) of subsection (a) shall be exempt from disclosure under section 552 of title 5.

(e) Exclusion. – This section does not apply to claims, records, or statements made under the Internal Revenue Code of 1986.

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31 U.S.C.A. §§ 3730

UNITED STATES CODE ANNOTATED

TITLE 31. MONEY AND FINANCE

SUBTITLE III – FINANCIAL MANAGEMENT

CHAPTER 37 – CLAIMS

SUBCHAPTER III – CLAIMS AGAINST THE UNITED STATES GOVERNMENT

Current through P.L. 107-11, approved 5-28-01

§§ 3730. Civil actions for false claims

(a) Responsibilities of the Attorney General. – The Attorney General diligently shall investigate a violation under section 3729. If the Attorney General finds that a person has violated or is violating section 3729, the Attorney General may bring a civil action under this section against the person.

(b) Actions by private persons. – (1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.

(2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to **Rule 4(d)(4) of the Federal Rules of Civil Procedure. [FN1]** The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.

(3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant pursuant to **Rule 4 of the Federal Rules of Civil Procedure**.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall –

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

(5) When a person brings an action under this subsection, no person other than the Government may intervene

or bring a related action based on the facts underlying the pending action.

(c) Rights of the parties to qui tam actions. – (1) If the Government proceeds with the action, it shall have the primary responsibility for prosecuting the action, and shall not be bound by an act of the person bringing the action. Such person shall have the right to continue as a party to the action, subject to the limitations set forth in paragraph (2).

(2)(A) The Government may dismiss the action notwithstanding the objections of the person initiating the action if the person has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion.

(B) The Government may settle the action with the defendant notwithstanding the objections of the person initiating the action if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances. Upon a showing of good cause, such hearing may be held in camera.

(C) Upon a showing by the Government that unrestricted participation during the course of the litigation by the person initiating the action would interfere with or unduly delay the Government's prosecution of the case, or would be repetitious, irrelevant, or for purposes of harassment, the court may, in its discretion, impose limitations on the person's participation, such as –

(i) limiting the number of witnesses the person may call;

(ii) limiting the length of the testimony of such witnesses;

(iii) limiting the person's cross-examination of witnesses; or

(iv) otherwise limiting the participation by the person in the litigation.

(D) Upon a showing by the defendant that unrestricted participation during the course of the litigation by the person initiating the action would be for purposes of harassment or would cause the defendant undue burden or unnecessary expense, the court may limit the participation by the person in the litigation.

(3) If the Government elects not to proceed with the action, the person who initiated the action shall have the right to conduct the action. If the Government so requests, it shall be served with copies of all pleadings filed in the action and shall be supplied with copies of all deposition transcripts (at the Government's expense). When a person proceeds with the action, the court, without limiting the status and rights of the person initiating the action, may nevertheless permit the Government to intervene at a later date upon a showing of good cause.

(4) Whether or not the Government proceeds with the action, upon a showing by the Government that certain actions of discovery by the person initiating the action would interfere with the Government's investigation or prosecution of a criminal or civil matter arising out of the same facts, the court may stay such discovery for a period of not more than 60 days. Such a showing shall be conducted in camera. the Court may extend the 60-day period upon a further showing in camera that the Government has pursued the criminal or civil investigation or proceedings with reasonable diligence and any proposed

discovery in the civil action will interfere with the ongoing criminal or civil investigation or proceedings.

(5) Notwithstanding subsection (b), the Government may elect to pursue its claim through any alternate remedy available to the Government, including any administrative proceeding to determine a civil money penalty. If any such alternate remedy is pursued in another proceeding, the person initiating the action shall have the same rights in such proceeding as such person would have had if the action had continued under this section. Any finding of fact or conclusion of law made in such other proceeding that has become final shall be conclusive on all parties to an action under this section. For purposes of the preceding sentence, a finding or conclusion is final if it has been finally determined on appeal to the appropriate court of the United States, if all time for filing such an appeal with respect to the finding or conclusion has expired, or if the finding or conclusion is not subject to judicial review.

(d) Award to qui tam plaintiff. – (1) If the Government proceeds with an action brought by a person under subsection (b), such person shall, subject to the second sentence of this paragraph, receive at least 15 percent but not more than 25 percent of the proceeds of the action or settlement of the claim, depending upon the extent to which the person substantially contributed to the prosecution of the action. Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government

Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. Any payment to a person under the first or second sentence of this paragraph shall be made from the proceeds. Any such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(2) If the Government does not proceed with an action under this section, the person bringing the action or settling the claim shall receive an amount which the court decides is reasonable for collecting the civil penalty and damages. The amount shall be not less than 25 percent and not more than 30 percent of the proceeds of the action or settlement and shall be paid out of such proceeds. Such person shall also receive an amount for reasonable expenses which the court finds to have been necessarily incurred, plus reasonable attorneys' fees and costs. All such expenses, fees, and costs shall be awarded against the defendant.

(3) Whether or not the Government proceeds with the action, if the court finds that the action was brought by a person who planned and initiated the violation of section 3729 upon which the action was brought, then the court may, to the extent the court considers appropriate, reduce the share of the proceeds of the action which the person would otherwise receive under paragraph (1) or (2) of

this subsection, taking into account the role of that person in advancing the case to litigation and any relevant circumstances pertaining to the violation. If the person bringing the action is convicted of criminal conduct arising from his or her role in the violation of section 3729, that person shall be dismissed from the civil action and shall not receive any share of the proceeds of the action. Such dismissal shall not prejudice the right of the United States to continue the action, represented by the Department of Justice.

(4) If the Government does not proceed with the action and the person bringing the action conducts the action, the court may award to the defendant its reasonable attorneys' fees and expenses if the defendant prevails in the action and the court finds that the claim of the person bringing the action was clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment.

(e) Certain actions barred. – (1) No court shall have jurisdiction over an action brought by a former or present member of the armed forces under subsection (b) of this section against a member of the armed forces arising out of such person's service in the armed forces.

(2)(A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought.

(B) For purposes of this paragraph, "senior executive branch official" means any officer or employee listed in

paragraphs (1) through (8) of section 101(f) of the Ethics in Government Act of 1978 (5 U.S.C.App.).

(3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or an administrative civil money penalty proceeding in which the Government is already a party.

(4)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(f) Government not liable for certain expenses. – The Government is not liable for expenses which a person incurs in bringing an action under this section.

(g) Fees and expenses to prevailing defendant. – In civil actions brought under this section by the United States, the provisions of section 2412(d) of title 28 shall apply.

(h) Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of

employment by his or her employer because of lawful acts done by the employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

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31 U.S.C.A. §§ 3731

UNITED STATES CODE ANNOTATED
TITLE 31. MONEY AND FINANCE

SUBTITLE III – FINANCIAL MANAGEMENT

CHAPTER 37 – CLAIMS

SUBCHAPTER III – CLAIMS AGAINST THE UNITED STATES GOVERNMENT

Current through P.L. 107-11, approved 5-28-01

§§ 3731. False claims procedure

(a) A subpena [sic] requiring the attendance of a witness at a trial or hearing conducted under section 3730 of this title may be served at any place in the United States.

(b) A civil action under section 3730 may not be brought –

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

(c) In any action brought under section 3730, the United States shall be required to prove all essential elements of the cause of action, including damages, by a preponderance of the evidence.

(d) Notwithstanding any other provision of law, the Federal Rules of Criminal Procedure, or the Federal Rules of Evidence, a final judgment rendered in favor of the United States in any criminal proceeding charging fraud or false statements, whether upon a verdict after trial or upon a plea of guilty or nolo contendere, shall estop the defendant from denying the essential elements of the offense in any action which involves the same transaction as in the criminal proceeding and which is brought under subsection (a) or (b) of section 3730.

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31 U.S.C.A. §§ 3732

UNITED STATES CODE ANNOTATED

TITLE 31. MONEY AND FINANCE

SUBTITLE iii – FINANCIAL MANAGEMENT

CHAPTER 37 – CLAIMS

SUBCHAPTER III – CLAIMS AGAINST THE UNITED STATES GOVERNMENT

Current through P.L. 107-11, approved 5-28-01

§§ 3732. False claims jurisdiction

(a) Actions under section 3730. – Any action under section 3730 may be brought in any judicial district in which the defendant or, in the case of multiple defendants, any one defendant can be found, resides, transacts business, or in which any act proscribed by section 3729 occurred. A summons as required by the Federal Rules of Civil Procedure shall be issued by the appropriate district court and served at any place within or outside the United States.

(b) Claims under state law. – The district courts shall have jurisdiction over any action brought under the laws of any State for the recovery of funds paid by a State or local government if the action arises from the same transaction or occurrence as an action brought under section 3730.

31 U.S.C.A. §§ 3733

UNITED STATES CODE ANNOTATED
TITLE 31. MONEY AND FINANCE

SUBTITLE III – FINANCIAL MANAGEMENT

CHAPTER 37 – CLAIMS

SUBCHAPTER III – CLAIMS AGAINST
THE UNITED STATES GOVERNMENT

Current through P.L. 107-11, approved 5-28-01

§§ 3733. Civil investigative demands

(a) In general. –

(1) Issuance and service. – Whenever the Attorney General has reason to believe that any person may be in possession, custody, or control of any documentary material or information relevant to a false claims law investigation, the Attorney General may, before commencing a civil proceeding under section 3730 or other false claims law, issue in writing and cause to be served upon such person, a civil investigative demand requiring such person –

(A) to produce such documentary material for inspection and copying,

(B) to answer in writing written interrogatories with respect to such documentary material or information,

(C) to give oral testimony concerning such documentary material or information, or

(D) to furnish any combination of such material, answers, or testimony.

The Attorney General may not delegate the authority to issue civil investigative demands under this subsection. Whenever a civil investigative demand is an express demand for any product of discovery, the Attorney General, the Deputy Attorney General, or an Assistant Attorney General shall cause to be served, in any manner authorized by this section, a copy of such demand upon the person from whom the discovery was obtained and shall notify the person to whom such demand is issued of the date on which such copy was served.

(2) Contents and deadlines –

(A) Each civil investigative demand issued under paragraph (1) shall state the nature of the conduct constituting the alleged violation of a false claims law which is under investigation, and the applicable provision of law alleged to be violated.

(B) If such demand is for the production of documentary material, the demand shall –

(i) describe each class of documentary material to be produced with such definiteness and certainty as to permit such material to be fairly identified;

(ii) prescribe a return date for each such class which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying; and

(iii) identify the false claims law investigator to whom such material shall be made available.

(C) If such demand is for answers to written interrogatories, the demand shall –

(i) set forth with specificity the written interrogatories to be answered;

(ii) prescribe dates at which time answers to written interrogatories shall be submitted; and

(iii) identify the false claims law investigator to whom such answers shall be submitted.

(D) If such demand is for the giving of oral testimony, the demand shall –

(i) prescribe a date, time, and place at which oral testimony shall be commenced;

(ii) identify a false claims law investigator who shall conduct the examination and the custodian to whom the transcript of such examination shall be submitted;

(iii) specify that such attendance and testimony are necessary to the conduct of the investigation;

(iv) notify the person receiving the demand of the right to be accompanied by an attorney and any other representative; and

(v) describe the general purpose for which the demand is being issued and the general nature of the testimony, including the primary areas of inquiry, which will be taken pursuant to the demand.

(E) Any civil investigative demand issued under this section which is an express demand for any product of discovery shall not be returned or returnable until 20 days after a copy of such demand has been served upon the person from whom the discovery was obtained.

(F) The date prescribed for the commencement of oral testimony pursuant to a civil investigative demand issued under this section shall be a date which is not less than seven days after the date on which demand is received, unless the Attorney General or an Assistant Attorney General designated by the Attorney General determines that exceptional circumstances are present which warrant the commencement of such testimony within a lesser period of time.

(G) The Attorney General shall not authorize the issuance under this section of more than one civil investigative demand for oral testimony by the same person unless the person requests otherwise or unless the Attorney General, after investigation, notifies that person in writing that an additional demand for oral testimony is necessary. The Attorney General may not, notwithstanding section 510 of title 28, authorize the performance, by any other officer, employee, or agency, of any function vested in the Attorney General under this subparagraph.

(b) Protected material or information –

(1) In general. – A civil investigative demand issued under subsection (a) may not require the production of any documentary material, the submission of any answers to written interrogatories, or the giving of any oral testimony if such material, answers, or testimony would be protected from disclosure under. –

(A) the standards applicable to subpoenas or subpoenas duces tecum issued by a court of the United States to aid in a grand jury investigation; or

(B) the standards applicable to discovery requests under the Federal Rules of Civil Procedure, to the extent that the application of such standards to any such demand is appropriate and consistent with the provisions and purposes of this section.

(2) Effect on other orders, rules, and laws. – Any such demand which is an express demand for any product of discovery supersedes any inconsistent order, rule, or provision of law (other than this section) preventing or restraining disclosure of such product of discovery to any person. Disclosure of any product of discovery pursuant to any such express demand does not constitute a waiver of any right or privilege which the person making such disclosure may be entitled to invoke to resist discovery of trial preparation materials.

(c) Service; jurisdiction. –

(1) By whom served. – Any civil investigative demand issued under subsection (a) may be served by a false claims law investigator, or by a United States marshal or a deputy marshal, at any place within the territorial jurisdiction of any court of the United States.

(2) Service in foreign countries. – Any such demand or any petition filed under subsection (j) may be served upon any person who is not found within the territorial jurisdiction of any court of the United States in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign country. To the extent that the courts of the United States can assert jurisdiction over any such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting

compliance with the section by any such person that such court would have if such person were personally within the jurisdiction of such court.

(d) Service upon legal entities and natural persons. –

(1) Legal entities. – Service of any civil investigative demand issued under subsection (a) or of any petition filed under subsection (j) may be made upon a partnership, corporation, association, or other legal entity by –

(A) delivering an executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of the partnership, corporation, association, or entity, or to any agent authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or entity;

(B) delivering an executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or entity; or

(C) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to such partnership, corporation, association, or entity at its principal office or place of business.

(2) Natural persons. – Service of any such demand or petition may be made upon any natural person by –

(A) delivering an executed copy of such demand or petition to the person; or

(B) depositing an executed copy of such demand or petition in the United States mails by registered or certified mail, with a return receipt requested, addressed to

the person at the person's residence or principal office or place of business.

(e) Proof of service. – A verified return by the individual serving any civil investigative demand issued under subsection (a) or any petition filed under subsection (j) setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand.

(f) Documentary material. –

(1) Sworn certificates. – The production of documentary material in response to a civil investigative demand served under this section shall be made under a sworn certificate, in such form as the demand designates, by –

(A) in the case of a natural person, the person to whom the demand is directed, or

(B) in the case of a person other than a natural person, a person having knowledge of the facts and circumstances relating to such production and authorized to act on behalf of such person.

The certificate shall state that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the false claims law investigator identified in the demand.

(2) Production of materials. – Any person upon whom any civil investigative demand for the production of documentary material has been served under this section shall make such material available for inspection and copying to the false claims law investigator identified in

such demand at the principal place of business of such person, or at such other place as the false claims law investigator and the person thereafter may agree and prescribe in writing, or as the court may direct under subsection (j)(1). Such material shall be made so available on the return date specified in such demand, or on such later date as the false claims law investigator may prescribe in writing. Such person may, upon written agreement between the person and the false claims law investigator, substitute copies for originals of all or any part of such material.

(g) Interrogatories. – Each interrogatory in a civil investigative demand served under this section shall be answered separately and fully in writing under oath and shall be submitted under a sworn certificate, in such form as the demand designates, by –

(1) in the case of a natural person, the person to whom the demand is directed, or

(2) in the case of a person other than a natural person, the person or persons responsible for answering each interrogatory.

If any interrogatory is objected to, the reasons for the objection shall be stated in the certificate instead of an answer. The certificate shall state that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted. To the extent that any information is not furnished, the information shall be identified and reasons set forth with particularity regarding the reasons why the information was not furnished.

(h) Oral examinations. –

(1) Procedures. – The examination of any person pursuant to a civil investigative demand for oral testimony served under this section shall be taken before an officer authorized to administer oaths and affirmations by the laws of the United States or of the place where the examination is held. The officer before whom the testimony is to be taken shall put the witness on oath or affirmation and shall, personally or by someone acting under the direction of the officer and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically and shall be transcribed. When the testimony is fully transcribed, the officer before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian. This subsection shall not preclude the taking of testimony by any means authorized by, and in a manner consistent with, the Federal Rules of Civil Procedure.

(2) Persons present. – The false claims law investigator conducting the examination shall exclude from the place where the examination is held all persons except the person giving the testimony, the attorney for and any other representative of the person giving the testimony, the attorney for the Government, any person who may be agreed upon by the attorney for the Government and the person giving the testimony, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(3) Where testimony taken. – The oral testimony of any person taken pursuant to a civil investigative demand

served under this section shall be taken in the judicial district of the United States within which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the false claims law investigator conducting the examination and such person.

(4) Transcript of testimony. – When the testimony is fully transcribed, the false claims law investigator or the officer before whom the testimony is taken shall afford the witness, who may be accompanied by counsel, a reasonable opportunity to examine and read the transcript, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the officer or the false claims law investigator, with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign. If the transcript is not signed by the witness within 30 days after being afforded a reasonable opportunity to examine it, the officer or the false claims law investigator shall sign it and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with the reasons, if any, given therefor.

(5) Certification and delivery to custodian. – The officer before whom the testimony is taken shall certify on the transcript that the witness was sworn by the officer and that the transcript is a true record of the testimony given

by the witness, and the officer or false claims law investigator shall promptly deliver the transcript, or send the transcript by registered or certified mail, to the custodian.

(6) Furnishing or inspection of transcript by witness. – Upon payment of reasonable charges therefor, the false claims law investigator shall furnish a copy of the transcript to the witness only, except that the Attorney General, the Deputy Attorney General, or an Assistant Attorney General may, for good cause, limit such witness to inspection of the official transcript of the witness' testimony.

(7) Conduct of oral testimony. – (A) Any person compelled to appear for oral testimony under a civil investigative demand issued under subsection (a) may be accompanied, represented, and advised by counsel. Counsel may advise such person, in confidence, with respect to any question asked of such person. Such person or counsel may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on the grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person may not otherwise object to or refuse to answer any questions, and may not directly or through counsel otherwise interrupt the oral examination. If such person refuses to answer any question, a petition may be filed in the district court of the United States under subsection (j)(1) for an order compelling such person to answer such question.

(B) If such person refuses to answer any question on the grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of part V of title 18.

(8) Witness fees and allowances. – Any person appearing for oral testimony under a civil investigative demand issued under subsection (a) shall be entitled to the same fees and allowances which are paid to witnesses in the district courts of the United States.

(i) Custodians of documents, answers, and transcripts. – (1) Designation. – The Attorney General shall designate a false claims law investigator to serve as custodian of documentary material, answers to interrogatories, and transcripts of oral testimony received under this section, and shall designate such additional false claims law investigators as the Attorney General determines from time to time to be necessary to serve as deputies to the custodian.

(2) Responsibility for materials; disclosure. – (A) A false claims law investigator who receives any documentary material, answers to interrogatories, or transcripts of oral testimony under this section shall transmit them to the custodian. The custodian shall take physical possession of such material, answers, or transcripts and shall be responsible for the use made of them and for the return of documentary material under paragraph (4).

(B) The custodian may cause the preparation of such copies of such documentary material, answers to interrogatories, or transcripts of oral testimony as may be

required for official use by any false claims law investigator, or other officer or employee of the Department of Justice, who is authorized for such use under regulations which the Attorney General shall issue. Such material, answers, and transcripts may be used by any such authorized false claims law investigator or other officer or employee in connection with the taking of oral testimony under this section.

(C) Except as otherwise provided in this subsection, no documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, while in the possession of the custodian, shall be available for examination by any individual other than a false claims law investigator or other officer or employee of the Department of Justice authorized under subparagraph (B). The prohibition in the preceding sentence on the availability of material, answers, or transcripts shall not apply if consent is given by the person who produced such material, answers, or transcripts, or, in the case of any product of discovery produced pursuant to an express demand for such material, consent if given by the person from whom the discovery was obtained. Nothing in this subparagraph is intended to prevent disclosure to the Congress, including any committee or subcommittee of the Congress, or to any other agency of the United States for use by such agency in furtherance of its statutory responsibilities. Disclosure of information to any such other agency shall be allowed only upon application, made by the Attorney General to a United States district court, showing substantial need for the use of the information by such agency in furtherance of its statutory responsibilities.

(D) While in the possession of the custodian and under such reasonable terms and conditions as the Attorney General shall prescribe –

(i) documentary material and answers to interrogatories shall be available for examination by the person who produced such material or answers, or by a representative of that person authorized by that person to examine such material and answers; and

(ii) transcripts of oral testimony shall be available for examination by the person who produced such testimony, or by a representative of that person authorized by that person to examine such transcripts.

(3) Use of material, answers, or transcripts in other proceedings. – Whenever any attorney of the Department of Justice has been designated to appear before any court, grand jury, or Federal agency in any case or proceeding, the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony received under this section may deliver to such attorney such material, answers, or transcripts for official use in connection with any such case or proceeding as such attorney determines to be required. Upon the completion of any such case or proceeding, such attorney shall return to the custodian any such material, answers, or transcripts so delivered which have not passed into the control of such court, grand jury, or agency through introduction into the record of such case or proceeding.

(4) Conditions for return of material. – If any documentary material has been produced by any person in the course of any false claims law investigation pursuant to a civil investigative demand under this section, and –

(A) any case or proceeding before the court or grand jury arising out of such investigation, or any proceeding before any Federal agency involving such material, has been completed, or

(B) no case or proceeding in which such material may be used has been commenced within a reasonable time after completion of the examination and analysis of all documentary material and other information assembled in the course of such investigation, the custodian shall, upon written request of the person who produced such material, return to such person any such material (other than copies furnished to the false claims law investigator under subsection (f)(2) or made for the Department of Justice under paragraph (2)(B)) which has not passed into the control of any court, grand jury, or agency through introduction into the record of such case or proceeding.

(5) Appointment of successor custodians. – In the event of the death, disability, or separation from service in the Department of Justice of the custodian of any documentary material, answers to interrogatories, or transcripts of oral testimony produced pursuant to a civil investigative demand under this section, or in the event of the official relief of such custodian from responsibility for the custody and control of such material, answers, or transcripts, the Attorney General shall promptly –

(A) designate another false claims law investigator to serve as custodian of such material, answers, or transcripts, and

(B) transmit in writing to the person who produced such material, answers, or testimony notice of the identity and address of the successor so designated.

Any person who is designated to be a successor under this paragraph shall have, with regard to such material, answers, or transcripts, the same duties and responsibilities as were imposed by this section upon that person's predecessor in office, except that the successor shall not be held responsible for any default or dereliction which occurred before that designation.

(j) Judicial proceedings. –

(1) Petition for enforcement. – Whenever any person fails to comply with any civil investigative demand issued under subsection (a), or whenever satisfactory copying or reproduction of any material requested in such demand cannot be done and such person refuses to surrender such material, the Attorney General may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person a petition for an order of such court for the enforcement of the civil investigative demand.

(2) Petition to modify or set aside demand. – (A) Any person who has received a civil investigative demand issued under subsection (a) may file, in the district court of the United States for the judicial district within which such person resides, is found, or transacts business, and serve upon the false claims law investigator identified in such demand a petition for an order of the court to modify or set aside such demand. In the case of a petition addressed to an express demand for any product of discovery, a petition to modify or set aside such demand may be brought only in the district court of the United States for the judicial district in which the proceeding in

which such discovery was obtained is or was last pending. Any petition under this subparagraph must be filed –

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the demand to comply with the provisions of this section or upon any constitutional or other legal right or privilege of such person. During the pendency of the petition in the court, the court may stay, as it deems proper, the running of the time allowed for compliance with the demand, in whole or in part, except that the person filing the petition shall comply with any portions of the demand not sought to be modified or set aside.

(3) Petition to modify or set aside demand for product of discovery. – (A) In the case of any civil investigative demand issued under subsection (a) which is an express demand for any product of discovery, the person from whom such discovery was obtained may file, in the district court of the United States for the judicial district in which the proceeding in which such discovery was obtained is or was last pending, and serve upon any false claims law investigator identified in the demand and upon the recipient of the demand, a petition for an order of such court to modify or set aside those portions of the demand requiring production of any such product of

discovery. Any petition under this subparagraph must be filed –

(i) within 20 days after the date of service of the civil investigative demand, or at any time before the return date specified in the demand, whichever date is earlier, or

(ii) within such longer period as may be prescribed in writing by any false claims law investigator identified in the demand.

(B) The petition shall specify each ground upon which the petitioner relies in seeking relief under subparagraph (A), and may be based upon any failure of the portions of the demand from which relief is sought to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of the petitioner. During the pendency of the petition, the court may stay, as it deems proper, compliance with the demand and the running of the time allowed for compliance with the demand.

(4) Petition to require performance by custodian of duties. – At any time during which any custodian is in custody or control of any documentary material or answers to interrogatories produced, or transcripts of oral testimony given, by any person in compliance with any civil investigative demand issued under subsection (a), such person, and in the case of an express demand for any product of discovery, the person from whom such discovery was obtained, may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court to require

the performance by the custodian of any duty imposed upon the custodian by this section.

(5) Jurisdiction. – Whenever any petition is filed in any district court of the United States under this subsection, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry out the provisions of this section. Any final order so entered shall be subject to appeal under section 1291 of title 28. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of the court.

(6) Applicability of federal rules of civil procedure. – The Federal Rules of Civil Procedure shall apply to any petition under this subsection, to the extent that such rules are not inconsistent with the provisions of this section.

(k) Disclosure exemption. – Any documentary material, answers to written interrogatories, or oral testimony provided under any civil investigative demand issued under subsection (a) shall be exempt from disclosure under section 552 of title 5.

(l) Definition. – For purposes of this section –

(1) the term "false claims law" means –

(A) this section and sections 3729 through 3732; and

(B) any Act of Congress enacted after the date of the enactment of this section which prohibits, or makes available to the United States in any court of the United States any civil remedy with respect to, any false claim against, bribery of, or corruption of any officer or employee of the United States;

(2) the term "false claims law investigation" means any inquiry conducted by any false claims law investigator for the purpose of ascertaining whether any person is or has been engaged in any violation of a false claims law;

(3) the term "false claims law investigator" means any attorney or investigator employed by the Department of Justice who is charged with the duty of enforcing or carrying into effect any false claims law, or any officer or employee of the United States acting under the direction and supervision of such attorney or investigator in connection with a false claims law investigation;

(4) the term "person" means any natural person, partnership, corporation, association, or other legal entity, including any State or political subdivision of a State;

(5) the term "documentary material" includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document, or data compilations stored in or accessible through computer or other information retrieval systems, together with instructions and all other materials necessary to use or interpret such data compilations, and any product of discovery;

(6) the term "custodian" means the custodian, or any deputy custodian, designated by the Attorney General under subsection (i)(1); and

(7) the term "product of discovery" includes –

(A) the original or duplicate of any deposition, interrogatory, document, thing, result of the inspection of land or other property, examination, or admission, which is

obtained by any method of discovery in any judicial or administrative proceeding of an adversarial nature;

(B) any digest, analysis, selection, compilation, or derivation of any item listed in subparagraph (A); and

(C) any index or other manner of access to any item listed in subparagraph (A).

FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

UNITED STATES OF AMERICA
ex rel. LINDA A. LUJAN,

Petitioners,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel LINDA A. LUJAN, Relator, v. HUGHES AIRCRAFT COMPANY, Defendant.	No. CV-92-1282 SVW ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

Hughes Aircraft Company ("Hughes") is presently moving to dismiss Linda Lujan's ("Lujan") qui tam action, arguing that it is barred by section 3730(b)(5) of the False Claims Act ("FCA") which prohibits any person other than the government from bringing a related action based on the facts underlying a qui tam action that has been previously filed. *See* 31 U.S.C. § 3730(b)(5). Hughes contends that Lujan's action is related to a previously filed qui tam action brought by William Schumer in 1989 ("Schumer action"). Representative of the importance of Schumer's action to the present motion, the history of the Schumer Case is provided below.

A. The Schumer Action

Schumer's action alleged that Hughes had mischarged costs on the radar systems of four different aircraft programs – the B-2, F-15, F-14 and F-18 – during its participation as a defense contractor between 1982 and 1990. Schumer alleged that Hughes used cost sharing agreements called "commonality agreements" to shifts costs from "fixed-priced" contracts to "cost reimbursement" contracts. The government conducted an audit of this practice in 1986 and 1988 and concluded that Hughes had overcharged the government. However, in 1989-90, the government reversed its earlier findings and determined that Hughes' commonality agreements were proper and actually saved the government money.

On May 20, 1992, Judge Pfaelzer granted summary judgment in favor of Hughes, finding that "Schumer has not shown that Hughes violated the False Claims Act." On appeal, the Ninth Circuit affirmed most of Judge Pfaelzer's findings, remanding only on two narrow issues concerning Hughes conduct prior to 1986: (1) whether Hughes failed to timely disclose the 1982 commonality agreement to Northrop, and (2) whether Hughes failed to reflect the commonality charging practice in its accounting disclosure statement to the Government between December 1982 and January 1984. *See United States ex rel Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1523-23 (9th Cir. 1995).

When Schumer appealed the grant of summary judgment to the Ninth Circuit, Hughes cross-appealed on another issue. Hughes had argued unsuccessfully in the district court that because government auditors had

alleged the same mischarging prior to Schumer filing his action, the action was barred under the "government knowledge" defense. 31 U.S.C. § 3730(b)(4) (1982). This defense was eliminated by the 1986 amendments to the FCA. However, Hughes argued that the amendments should not be applied retroactively to Hughes' pre-1986 conduct. The Ninth Circuit disagreed with Hughes and held that the 1986 Amendment which eliminated the government knowledge defense applied retroactively to Hughes' pre-1986 conduct because it did not affect a "substantive right." *United States ex rel Schumer,* 63 F.3d at 1516-17.

Hughes appealed to the Supreme Court, and certiorari was granted with respect to: (1) whether the 1986 Amendments applied to pre-1986 conduct, (2) whether any of Schumer's claims were jurisdictionally barred by the Public Disclosure provisions of the FCA, and (3) whether the two issues that the Ninth Circuit had remanded – concerning the alleged disclosure infractions from 1982-84 – could possibly give rise to a FCA violation in view of the government's determination that there was no financial harm to the government.

The Supreme Court held that the 1986 amendments did not apply retroactively and thus, Schumer's pre-1986 claims were barred by the government knowledge defense which was present in the 1982 version of the FCA. Because the only claims remaining after the Ninth Circuit's ruling were pre-1986 claims, the entire case had to be dismissed. Therefore, the Supreme Court declined to reach the remaining issues presented for review.

B. Lujan's Action

Lujan filed this *qui tam* action against her previous employer, Hughes, in 1992. Lake Schumer, she alleged that Hughes submitted false claims to the government during its participation as a defense contractor in the B2 bomber and other projects between 1982 and 1989.

Apparently, soon after filing the action, Lujan's previous counsel brought the case to the attention of the media, in violation of the 60 day sealing provision in the statute. Hughes brought a motion to dismiss the action based on this violation. Judge Ideman, who previously had this case, granted dismissal on that basis.

The Ninth Circuit reversed Judge Ideman's decision, directing the district court to evaluate whether a lesser sanction may have been appropriate and providing some guidelines for this inquiry. In addition, the Ninth Circuit noted that this action appeared to be quite similar to the Schumer action and, sua sponte, directed the district court to consider whether Lujan's case was jurisdictionally barred based on § 3730(e)(4) of the False Claims Act.

Section 3730(e)(4) is a jurisdictional provision that bars qui tam actions which are "substantially similar" to allegations that were previously disclosed to the public. The Ninth Circuit directed the district court to consider whether the Schumer action resulted in public disclosure of the allegations in Lujan's action and therefore barred the Lujan action.

The district court directed the parties to brief the "public disclosure" issue and eventually dismissed

Lujan's action for lack of subject matter jurisdiction based on § 3730(e)(4). On appeal, the Ninth circuit reversed the district court's decision, finding that while the Schumer action was substantially similar to the Lujan action and thus, the Schumer action constituted public disclosure of Lujan's allegations, Lujan's action was not barred because Lujan fell within the exception to the public disclosure rule because she was an "original source" of the allegations. The Ninth Circuit also determined that Lujan could only maintain allegations arising from false claims submitted by Hughes after 1986. This ruling was based on the Supreme Court's decision in *Schumer* which held that the 1986 amendments to the FCA did not apply retroactively and thus, false claims which arose prior to 1986 were subject to the 1982 jurisdictional provisions which barred claims based upon information of which the government was already aware.

At this point Lujan's case has been remanded once again from the Ninth Circuit. Lujan's allegations have been limited by the Ninth Circuit to allegedly-false claims submitted by Hughes between 1986 and 1989. Defendant Hughes now brings another motion to dismiss based on lack of subject matter jurisdiction under § 3730(b)(5) of the FCA, res judicata and collateral estoppel.

II. Lujan's Action Is Barred By Section 1730(b)(5)

A. Section 37320(b)(5)

Section 3730(b)(5) states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action

based on the facts underlying the pending action." (emphasis added)

B. The Ninth Circuit Did Not Implicitly Reject Hughes' Section 3730(b)(5) Defense

Lujan argues that Hughes already presented this jurisdictional defense to the district court and the Ninth Circuit and lost. Therefore, Lujan contends, Hughes is barred from rearguing the issue now. Lujan's contentions are based on the fact that Hughes argued this issue to the district court and the Ninth Circuit. However, a look at the interesting manner in which this issue arose, coupled with a close reading of the district court and Ninth Circuit orders, makes clear that neither court addressed or "implicitly" decided this issue.

As discussed previously, when the Ninth Circuit reversed that district court's dismissal based on violation of the sealing provision, it directed the district court to consider whether Lujan's action was barred based on lack of subject mater jurisdiction under section 3730(e)(4) because the allegations in Lujan's complaint were similar to those publicly disclosed in the Schumer action. In the district court's "Order Re Briefing of Issues Upon Remand," the parties were directed to brief this specific issue. The district court granted dismissal based on lack of subject matter jurisdiction pursuant to § 3730(e)(4). Regardless of whether Hughes attempted to argue that the case should have been dismissed based on lack of subject matter jurisdiction under § 3730(b)(5) as well, it is clear that the district court based its decision solely on § 3730(e)(4) and did not mention or discuss § 3730(b)(5).

When the dismissal was appealed to the Ninth Circuit, subject matter jurisdiction under § 3730(e)(4) was the only issue squarely presented. While Hughes may have attempted to raise a § 3730(b)(5) argument in its brief and oral argument to the Ninth Circuit, there is no indication in the Ninth Circuit's opinion that it considered the § 3730(b)(5) issue in rendering its decision that subject matter jurisdiction did exist under § 3730(e)(4).

Plaintiff argues that the Ninth Circuit's very silence implies that it rejected the defendant's argument. However, it is much more likely that the Ninth Circuit merely preferred to have the district court address this issue first before making its determination. Therefore, this court does not find Lujan's contention that the Ninth Circuit implicitly rejected Hughes § 3730(b)(5) persuasive.

C. Section 3730(b)(5) Applies To This Action Because Schumer's Action Was Pending At The Time Lujan Filed Her Case

Plaintiff argues that § 3730(b)(5) applies only when another action is "pending" and that because Schumer's action was dismissed in 1997, there is no action pending which would bar Lujan's action. This argument is disingenuous.

Schumer's action was pending at the time that Lujan filed her claim. Therefore, under the plain meaning of the statute, Lujan's action is barred if the Court determines that it is related to the Schumer action because Lujan brought this lawsuit while the Schumer action was pending. Plaintiff's suggested interpretation of § 3730(b)(5) would strip the provision of meaning since both the case

law and legislative history of the FCA support the interpretation that § 3730(b)(5) was intended to create a "first to file" rule which would prevent multiple separate suits based on the same claims. *See e.g., United States ex rel Erickson v. American Institute of Biological Sciences*, 716 F. Supp. 908, 918 (E.D. Va. 1989). To allow subsequent qui tam lawsuits to be filed as long as the previously-filed qui tam actions had been dismissed would be entirely contrary to the goals of § 3730(b)(5). Thus, the Court rejects this argument.

D. Lujan's Claims Are Related To Schumer's Claims

1. Standard For Determining Related Claims Under Section 3730(b)(5)

Section 3730(b)(5) has been interpreted as a "first to file" rule which sets a jurisdictional bar to any related *qui tam* action. *See United States ex rel. Erickson v. American Inst. of Biological Sciences*, 716 F. Supp. 908, 918-19 (E.D. Va. 1989). One of the purposes of the 1986 amendments, which altered the jurisdictional barriers to bringing a qui tam lawsuit, was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266. The amendments were also an attempt "to clarify in the statute that private enforcement under the civil False claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6290; *see also United States ex rel.*

Taxpayers Against Fraud and Walsh v. General Electric Company, 41 F.3d 1032, 1035 (6th Cir. 1994).

While courts have been anything but uniform in interpreting what constitutes a related case under section 3730(b)(5), most courts have rejected an identical facts test. *See United States ex rel. Capella v. United Technologies Corp.*, 1999 WL 464546 at *8 (D. Conn. June 3, 1999) (analyzing tests applied by other courts). The Third Circuit's test focuses on whether the "later filed allegation states all the essential facts of a previously-filed claim." *United States ex rel. LaCorte v. Smithkline Beecham Clinical Laboratories, Inc.*, 149 F.3d 227, 232-33 (3d Cir. 1998). If the claim is based on the same essential facts or circumstances, it is barred regardless of the fact that the allegations "incorporate[ ] somewhat different details." *Id.* Similarly, Judge Kenyon, of the Central District of California, concluded that § 3730(b)(5) bars claims to the extent that they raise "issues which were the subject of the [prior action]." *Hyatt v. Northrup Corp.*, 1989 U.S. Dist. LEXIS 18941, AT *2. The Eleventh Circuit has also indicated, although in dicta, that qui tam cases based on "the same type of conduct would be barred." *United States ex rel. Cooper v. Blue Cross and Blue Shield of Florada* [sic], *Inc.*, 19 F.3d 562, 567 (11th Cir. 1994). In *United States ex rel. Erickson*, a lower court in Virginia adopted a somewhat different two-part test under § 3730(b)(5): "A subsequently filed qui tam suit may continue only to the extend [sic] that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to a separate and distinct recovery by the government." 716 F. Supp. at 918. While all of these cases apply a somewhat different standard in determining whether a subsequently

filed qui tam case is barred under § 3730(b)(5), "they contain one common principle – section 3730(b)(5) precludes a subsequent relator's claim that alleges the defendant engaged in the same type of wrongdoing as that claimed in a prior action even if the allegations cover a different time period or location within a company." *United States ex rel. Capella v. United Technologies Corp.*, 1999 WL 464536, *9 (D. Conn. June 3, 1999).[1]

The First Circuit has adopted quite a different approach: "We think a court should look first to whether the two cases can properly be seen as having a host-parasite relationship. In answering the question, we think it would be useful . . . [to] ask whether the qui tam case is receiving 'support, advantage, or the like' from the host case. . . . " *United States ex rel. S. Prawer & Co. v. Fleet Bank of Maine*, 24 F.3d 320, 327 (1st Cir. 1994) (internal citations omitted). The First circuit's analysis was in connection with § 3730(e)(3) which bars a qui tam suit based upon transactions or allegations which are the subject of another suit in which the government is a party. However, the same analysis could clearly apply under § 3730(b)(5) and, in fact, one district court has held that this host-parasite analysis may be useful in analyzing

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[1] Lujan argues that section 3730(b)(5) only precludes a subsequently filed qui tam suit based on identical facts. Plaintiff relies solely on *United States ex rel. Dorsey v. Warren E. Smith Community health/Mental Retardation & Substance Abuse Centers*, C.A. No. 95-7446, 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997) for this proposition. *Dorsey* appears to be the only court to have adopted such a stringent standard and it seems that *Dorsey* is no longer good law since more recent Third Circuit opinion in *LaCorte* appears to overrule it.

§ 3730(b)(5) cases. *See Capella*, 1993 WL 464536, *8-9. The First Circuit indicated that where a host-parasite relationship was found, an identity between the later filed qui tam action (the "parasite") and the earlier case (the "host") could be presumed, while the lack of a host-parasite relationship would indicate there was no identity between the two cases. *Id.* at 328.

While the Court agrees that the existence of a host-parasite type relationship might generally be indicative of whether the later filed qui tam action is "related to" or based upon the same facts as the previously filed case, the court does not find this test particularly helpful. Under this test, two or even ten relators who had independent knowledge of a scheme to submit false claims to the government could all file suit based on identical facts. None of the relators would be receiving support or advantage from any of the other relators because of their independent knowledge. Therefore, no host-parasite relationship would exist and, under the First Circuit's test, all cases could logically go forward. However, § 3730(b)(5), unlike the public disclosure jurisdictional bar found in § 3730(e)(4), contains no exception for relator's who are deemed to be an "original source" of the allegations. Therefore, the hypothetical identical suits should clearly be barred from going forward under a plain reading of the § 3730(b)(5)

The Court finds the Third Circuit's test and reasoning set forth in the *LaCorte* decision more persuasive. The Court agrees that,

> [A]s a matter of fairness claimants alleging the same material facts as prior relators should not

> share in a qui tam award, because their allegations are unlikely to increase the total recovery. In addition, such duplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.

149 F.3d at 234.

Therefore, the Court will apply the test adopted by the Third Circuit in *LaCorte* to determine whether Lujan is barred by § 3730(b)(5) from bringing the present qui tam action. Thus, if Lujan's claims are based on the same essential facts as Schumer's claims, § 3730(b)(5) bars Lujan's case regardless of whether the two claims incorporate somewhat different details.

2. Lujan's And Schumer's allegations Are Based On The Same Essential Facts

Judge Ideman determined that Lujan's allegations were "substantially similar" and thus, were "based upon" those publicly disclosed in Schumer's lawsuit. *See* Minute Order Dismissing Relator Lujan's Qui Tam Counts (Mar. 19, 1996). Lujan attempted to distinguish her allegations as involving mischarging within the B-2 program while Schumer's allegations involved cost shifting among the B-2 program and other aircrafts. However, upon reviewing both sets of allegations, the district court previously found that "Lujan's allegations are simply a variation on Schumer's." The court went on to conclude that "[t]o give credence to Lujan's microscopically fine distinctions between her allegations and those of Schumer would do injustice to the purposes underlying the False Claims

Act." *Id.* at 6 (internal citation omitted). In reviewing the district court's determination, the Ninth Circuit affirmed the finding that the:

> Schumer and Lujan allegations both involve cost-sharing transactions among and within the radar systems programs on four aircraft. The two claims involve the same commonality agreements and the same radar program contracts. In sum, we agree with the district court that Lujan's allegations are substantially similar to those disclosed in the earlier Schumer action.

Lujan, 162 F.3d at 1033.

The Court concludes that Lujan's lawsuit is based upon the same essential facts and raises the same issues as Schumer's previously-filed action. Therefore, Lujan's action is barred by § 3730(b)(5).

E. Lujan's Contention that Schumer's Claims Should Not Be Considered Because They Were Not Decided on the Merits is Incorrect

The Court need not decide whether Lujan's claim would be barred even if Schumer's claims were not decided on the merits because it is clear, given the procedural history of the Schumer action, that the only claims of Schumer's that were not decided on the merits involved pre-1986 conduct, conduct that is no longer at issue in Lujan's case after the Ninth Circuit's recent decision. Lujan's remaining claims parallel Schumer's post-1996 claims which were decided against Schumer on the merits by Judge Pfaelzer in 1992 and affirmed by the

Ninth Circuit in 1995. Therefore, Lujan's argument is without merit.

III. Conclusion

Lujan is barred from bring [sic] this qui tam action by § 3730(b)(5) of the FCA because her action is related to a previously-filed qui tam lawsuit initiated by Schumer.[2] Therefore, Lujan's action is dismissed.

IT IS SO ORDERED.

DATED: 1/20/2000

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

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[2] Because the Court finds that Lujan's action must be dismissed pursuant to § 3730(b)(5), the Court declines to address Hughes' novel arguments that Lujan's action is also barred by res judicata and collateral estoppel.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. LINDA A. LUJAN, Plaintiff, v. HUGHES AIRCRAFT COMPANY, Defendant.	CASE NO. CV 92-1282 SVW JUDGMENT (Filed Jan. 20, 2000)

The Court has dismissed Linda A. Lujan's qui tam action because it is barred by § 3730(b)(5) of the False Claims Act. *See* 31 U.S.C. § 3730(b)(5).

The Court hereby enters judgment in favor of defendant Hughes Aircraft Company and against plaintiff Linda A. Lujan. Pursuant to this judgment, plaintiff shall take nothing as against defendant.

IT IS SO ORDERED.

DATED: 1/20/2000

/s/ Stephen V. Wilson
STEPHEN V. WILSON
UNITED STATES
DISTRICT JUDGE

(3)

Supreme Court, U.S.
FILED
OCT 23 2001
OFFICE OF THE CLERK

No. 01-413

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2001

UNITED STATES OF AMERICA *ex rel.* LINDA A. LUJAN,

Petitioner,

v.

HUGHES AIRCRAFT COMPANY,

Respondent.

On Petition for a Writ of *Certiorari*
to the United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF *CERTIORARI*

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51MP

QUESTION PRESENTED

Hughes Aircraft Company takes issue with the argumentative, unclear and confusing statement of the questions presented in the petition. Instead, Hughes believes that the question raised by the petition can be stated simply as follows:

Did the Ninth Circuit err in determining that Petitioner Linda A. Lujan's "qui tam" action was barred by the False Claims Act's "first-to-file" rule set forth in 31 U.S.C. § 3730(b)(5)?

PARTIES TO THE PROCEEDING

Respondent Hughes Aircraft Company ("Hughes") clarifies that Petitioner's "List of Parties" includes "United States of America." The United States is not a party to this action. This being a "qui tam" action under the False Claims Act, 31 U.S.C. §§ 3729, *et seq.*, the United States had the right to intervene in the action at the outset (31 U.S.C. § 3730(b)(4)(B)), but it notified the District Court that it declined to do so.

CORPORATE DISCLOSURE STATEMENT

Hughes Aircraft Company was, at the time this lawsuit was filed, a Delaware corporation, which was a wholly-owned subsidiary of Hughes Electronics Corporation, a Delaware corporation, which was a wholly-owned subsidiary of General Motors Corporation. In December 1997, Hughes Aircraft Company merged with Raytheon Company, a Delaware corporation, which has issued various classes of shares to the public.

OPINION BELOW

Hughes clarifies that the only decision on which the Petitioner seeks review is *United States ex rel. Lujan v. Hughes Aircraft Company*, 243 F.3d 1181 (9th Cir. 2001) (referred to as *Lujan III* because it was the third time the Ninth Circuit had rendered a decision in the case). The two other *Lujan* decisions listed in the Petition are prior decisions in this action which are not presented for review.

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INTRODUCTION

Respondent Hughes Aircraft Company ("Hughes") asserts herein that there is no proper ground for granting the petition. Lujan appeals from a decision which barred her False Claims Act "qui tam" action because her action was based on a qui tam action filed earlier by someone else. 31 U.S.C. § 3730(b)(5).[1] The language of that "first-to-file" provision is clear, and there is no split among the circuits as to its interpretation or application. Further, there is no compelling reason to grant the Writ. *See* S.Ct. Rule 10.

Lujan's petition presents a distorted set of facts in an effort to fabricate some error by the Ninth Circuit. Lujan claims that the Ninth Circuit ignored the "law of the case" doctrine as articulated by this Court in *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Lujan asserts that prior to the Ninth Circuit rendering the decision which is the subject of her petition, an earlier Ninth Circuit panel had "implicitly" ruled that her action was somehow exempt from the application of the first-to-file rule in § 3730(b)(5). Thus, she contends it was improper for the subsequent panel to consider and rule against her on that question.

The facts and the procedural history of Lujan's action, however, demonstrate clearly that the Ninth Circuit did not "ignore" the law of the case doctrine. In the prior decision to which she refers, the Ninth Circuit simply did not consider or even mention the "first-to-file" rule. Thus, there was no law of the case established; consequently *Christianson's* law of the case doctrine did not apply in this situation.

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[1] Section 3730(b)(5) provides: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on facts underlying the pending action."

The subsequent panel, rendering the decision which is the subject of Lujan's petition, rejected Lujan's baseless interpretation of the earlier panel's decision and held: "we did not explicitly or implicitly decide that issue." *United States ex rel. Lujan v. Hughes Aircraft Company*, 243 F.3d 1181, 1187 (9th Cir. 2001) ("*Lujan III*"). Therefore, the court, in *Lujan III*, properly considered *for the first time* whether her action was barred by the first-to-file rule. The court concluded that Lujan's action was barred because she was not the first-to-file.

PERTINENT STATUTORY PROVISIONS

The Petitioner refers to and appends the entire False Claims Act. Hughes notes that only two particular provisions in that appendix are at issue: 31 U.S.C. § 3730(b)(5) and § 3730(e)(4).

STATEMENT OF THE CASE

Lujan filed this "qui tam" action pursuant to the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, in 1992. Lujan's complaint alleged that her former employer, Hughes, mischarged costs to the U.S. Government for the development and production of radar systems on four different aircraft programs—the B-2, F-15, F-14, and F-18 aircraft.

Lujan was not the first qui tam relator to file these claims against Hughes. Lujan's allegations were substantially similar to those which had been brought three years earlier by another former employee of Hughes, named William Schumer ("Schumer"). *See United States ex rel. Lujan v. Hughes Aircraft Co.*, 162 F.3d 1027, 1032 (9th Cir. 1998) ("*Lujan II*") (finding substantially similarity between Lujan's and Schumer's actions).

The question presented by Lujan's petition requires an accurate conveyance of the procedural history of both

Schumer's and Lujan's qui tam actions, including the various decisions rendered in the two actions. As noted below, Lujan's description of this history is not accurate, and her mischaracterizations are the groundwork of her flawed legal arguments.

Schumer's action. Schumer filed his action in 1989 alleging cost mischarging within and among the same four radar programs noted above, from the period of 1982 through 1989. Even before Schumer filed his action, the Government had been auditing these same costs. After Schumer filed his action, the government rendered a determination that the costs had been charged properly and in a manner which had actually saved the Government money. *See Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 942-43, fn.1 (1997). In 1992, the District Court granted summary judgment in *Schumer* in favor of Hughes, concluding that the questioned costs had been charged appropriately. *See United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1516 (9th Cir. 1995). The Ninth Circuit affirmed the dismissal on the merits of nearly all of the District Court's findings, but it remanded for further consideration two particular representations made by Hughes in 1982 and 1984. *See Schumer*, 63 F.3d at 1523-25.

Hughes had asserted that, because those two allegations concerned conduct occurring before 1986, they were barred under the FCA's pre-1986 jurisdictional bar. *Schumer*, 63 F.3d at 1517. That provision barred any qui tam action based on information already known to the Government. *See* 31 U.S.C. § 3730(b)(4) (1982). However, the Ninth Circuit rejected Hughes' argument, holding that the elimination of that "government knowledge" defense by the 1986 FCA amendments applied retroactively. *Schumer*, 63 F.3d at 1516-17. Hughes appealed that holding to this Court, which held that the 1986 Amendments could not be applied retroactively to pre-1986 conduct, *i.e.*, that Schumer's pre-1986 allegations were barred by the pre-1986 FCA's "government knowledge" defense. *Schumer*, 520 U.S. at 946-52.

Thus, in sum, Schumer's action was disposed of as follows: (a) his pre-1986 claims were jurisdictionally barred, and (b) his post-1986 claims were dismissed on the merits, and that dismissal was affirmed by the Ninth Circuit and unaffected by the Supreme Court's decision regarding the lack of jurisdiction over the pre-1986 claims. *Schumer*, 63 F.3d at 1528.

Lujan ignores this latter result. She asserts, with no foundation, that the entire *Schumer* case was, in effect, a "nullity" because of this Court's determination as to the lack of jurisdiction over Schumer's pre-1986 claims. In fact, the District Court in the instant action accurately recounted the procedural history of *Schumer* and found that "the only claims of Schumer's that were not decided on the merits involved pre-1986 conduct . . . ." *See* Order Granting Defendant's Motion to Dismiss (Jan. 20, 2000). Resp. App. at 19. Thus, Schumer's post-1986 claims were not a "nullity," in any sense; they were litigated and found to be without merit.

Lujan's action. In 1992, Lujan filed her action, attempting to revive the same allegations that Schumer had made. The District Court first dismissed her action for violation of the requirement that it be filed *in camera*. 31 U.S.C. § 3730(b)(2). The Ninth Circuit reversed that dismissal order, but in so doing, it noted, *sua sponte,* that Lujan's allegations resembled those which it had seen in the *Schumer* case. *United States ex rel. Lujan v. Hughes Aircraft Co.*, 67 F.3d 242, 248 (9th Cir. 1995) ("*Lujan I*"). Accordingly, the Ninth Circuit specifically ordered the District Court to consider whether Lujan's action was barred under the particular provision of the FCA which jurisdictionally bars qui tam actions based upon publicly

disclosed allegations of which the relator is not an original source -- Section 3730(e)(4).[2] *Id.*

Following the precise mandate of the Ninth Circuit, as it was obligated to do, the District Court issued a briefing order directing the parties to brief *only* the question of jurisdiction under section 3730(e)(4). *See* Order Re Briefing Issues Upon Remand (Dec. 13, 1995). Resp. App. at 1-2. Accordingly, the parties briefed only that particular question. At that time Hughes did not raise and the District Court did not consider the FCA's first-to-file bar (§ 3730(b)(5)). The District Court dismissed Lujan's action, concluding that her allegations were indeed "substantially similar" to Schumer's and, thus, were "based upon" Schumer's "public disclosure." *See* Order Dismissing Relator's Qui Tam Counts (March 19, 1996). Resp. App. at 7.

On appeal, the Ninth Circuit, in *Lujan II*, agreed that Lujan's case was "substantially similar" to Schumer's, and therefore, the "public disclosure" bar applied. *Lujan II*, 162 F.3d at 1033. However, *Lujan II* also found that Lujan alleged sufficient knowledge and disclosure that she qualified as an "original source" under § 3730(e)(4)(B), which exempted her from the "public disclosure" jurisdictional bar. 162 F.3d at 1033-34. Accordingly, the

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[2] Section 3730(e)(4) specifically provides that "no court shall have jurisdiction over an action based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or [GAO] report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information." An original source means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided information to the Government before the filing of an action which is based on the information. 31 U.S.C. § 3730(e)(4)(B).

Ninth Circuit remanded the case "[b]ecause the District Court has subject matter jurisdiction *under the 'original source' exception* to the 1986 FCA." *Id.* at 1034 (emphasis added). Lujan's petition ignores that the decision in *Lujan II* was limited solely to the "public disclosure/original source" determination. *See* Petition at 4.

Because the first-to-file defense, contained in Section 3730(b)(5), had not yet been briefed to the District Court and had not been a basis for the District Court's decision that her action was barred under the "public disclosure" provision, the Ninth Circuit in *Lujan II*, did not address or even mention the first-to-file defense.[3]

When the matter returned to the District Court after *Lujan II*, Hughes was free to assert for the first time before the District Court that Lujan's action was barred by the first-to-file rule under section 3730(b)(5). Lujan raised the same fanciful argument she raises now — that *Lujan II* somehow implicitly decided that she was exempt from the first-to-file rule even though the *Lujan II* decision never mentions that rule or even hints that it was under consideration.

The District Court properly rejected Lujan's reading of the *Lujan II* decision, based on the court's accurate

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[3] Hughes included a short argument about the first-to-file bar in its appellate brief in *Lujan II*, but the court never addressed that argument. Hughes mentioned it again in its petition for rehearing *en banc*, noting that the *Lujan II* panel had completely ignored the first-to-file argument. The Ninth Circuit simply denied Hughes' petition for rehearing without any comment. That notice of denial cannot be interpreted as a consideration and rejection of the first-to-file defense, as Lujan would believe. *See United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (the failure of an appellate court to grant a rehearing "does not indicate the court considered and decided the issue").

recounting of the case's procedural history. The District Court observed that in *Lujan II*:

> [S]ubject matter jurisdiction under § 3730(e)(4) was the only issue squarely presented. While Hughes may have attempted to raise a § 3730(b)(5) argument in its brief and oral argument to the Ninth Circuit, there is no indication in the Ninth Circuit's opinion that it considered the § 3730(b)(5) issue in rendering its decision that subject matter jurisdiction did exist under § 3730(e)(4).

Resp. App. at 14. The District Court correctly concluded that *Lujan II's* silence on the 3730(b)(5) question was not a ruling on the issue but, rather, it was "much more likely that the Ninth Circuit preferred to have the district court address this issue first before making its determination." Resp. App. at 14.

After deciding that it was free to render a decision on whether Lujan's action was barred by the first-to-file rule, the District Court held that her action was indeed barred under that rule. The District Court found that 3730(b)(5) was expressly a first-to-file rule, that Schumer was the first to file, and, because she was the second to file, Lujan's case was foreclosed by that rule.[4] Resp. App. at 14-20.

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[4] The District Court also rejected Lujan's contention—which she repeats in the petition—that Schumer's action was no longer "pending" within the meaning of the FCA. The District Court noted that such a "disingenuous" interpretation would "strip the provision of meaning since both the case law and legislative history of the FCA support the interpretation that § 3730(b)(5) was intended to create a 'first to file' rule . . ." Resp. App. at 14-15.

On appeal, the Ninth Circuit in *Lujan III* agreed with every element of the District Court's opinion. *Lujan III*, 243 F.3d 1181 (9th Cir. 2001). Lujan reiterated her argument that the earlier decision in *Lujan II* had somehow exempted her from the application of the first-to-file rule. She further asserted that this supposed silent holding in *Lujan II* constituted "the law of the case," such that the District Court was precluded from considering the first-to-file issue under § 3730(b)(5).

Lujan III properly rejected Lujan's argument. The Ninth Circuit held that *Lujan II* had not addressed the first-to-file issue and that it was now proper for the court to do so. 243 F.3d at 1186-87. The court noted that the law of the case doctrine "does not apply to issues not addressed by the appellate court." *Id.* Lujan's petition erroneously states that the panel in *Lujan III* found that *Lujan II* was "not controlling." Petition at 5. That is not what *Lujan III* stated or found. Quite simply, the *Lujan III* panel found that "[w]hile Hughes argued a § 3730(b)(5) jurisdictional challenge to this court [in *Lujan II*], we did not explicitly or implicitly decide that issue." 243 F.3d at 1187. Thus, the Ninth Circuit found, in *Lujan III*, that the doctrine of "the law of the case" was not applicable because there had been no prior ruling which would preclude their consideration of the first-to-file issue.[5]

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[5] Moreover, the Ninth Circuit suggested, without discussion, that even if *Lujan II* had, in fact, decided that Lujan was exempt from the first-to-file rule, the court could correct such an obviously erroneous ruling to "prevent manifest injustice." 243 F.3d at 1187. Notwithstanding Lujan's argument (Petition at 10), that *Lujan III* actually applied the "manifest injustice" exception to the law of the case doctrine, the court did not apply that exception. The court merely noted the exception as an alternative. *Id.* at 1187.

Having held that it was proper for the court to consider the application of the first-to-file rule, the court went on to find that Lujan's action was indeed barred by the first-to-file rule. *Id.* at 1187-90.[6] The court rejected Lujan's argument that the first-to-file rule (§ 3730(b)(5)) did not apply in this case because *Schumer*, having been dismissed, was no longer "pending." The court noted that *Schumer* still had been pending at the time Lujan filed her action. 243 F.3d at 1188. The court held that *Schumer's* eventual dismissal did not enable Lujan to proceed with her action. *Id.* The court explained that the FCA's plain language allowed no support for Lujan's convoluted interpretation of the statute which, if accepted, would contravene the FCA's legislative intent of barring duplicative qui tam actions. *Id.*

REASONS FOR DENYING THE PETITION

Pursuant to Rule 10 of this Court, review on a writ of *certiorari* is not a matter of right, but of discretion. Rule 10 identifies several compelling reasons the Court is to consider. These reasons include the entering of a decision by a court of appeals that is in conflict with the decision of another court of appeals "on the same important matter" or "has so far

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[6] The court held that Lujan's action was based on the facts underlying Schumer's earlier action. *Id.* at 1189. Lujan does not suggest in her Petition that the court erred in finding that the material facts alleged in her action were "based on" Schumer's action. The court also rejected Lujan's assertion that her status as an "original source" under § 3730(e)(4)(B), exempted her from the first-to-file rule. The court held that 3730(b)(5) was a first-to-file bar which, by its plain language, offered no original source exception. 243 F.3d at 1187. Having evidently recognized the futility of asking federal courts to amend legislation, Lujan does not overtly repeat that argument in the instant petition. However, she vaguely suggests in the petition that her "original source" status somehow makes her a "proper relator" (Petition at 16), when in fact such status has no bearing under § 3730(b)(5)'s first-to-file rule. *See Lujan III*, 243 F.3d at 1187.

departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory powers." S.Ct. Rule 10(a).

Rule 10 further indicates that the Writ should be denied where a petition asserts error consisting simply of erroneous factual findings or argues that there has been misapplication of a properly stated rule of law. The grant of the writ is reserved for special and significant cases involving important public principles or where there is a real conflict of authority between the circuits. S.Ct. Rule 10.

Lujan does not meet any of these standards. She provides no compelling reason for granting the writ. She presents no conflict among the circuits as to how to interpret the False Claims Act's first-to-file rule. The Ninth Circuit applied a clear and correct interpretation of § 3730(b)(5), holding that because Lujan filed second to Schumer, her claim is barred.

Furthermore, there is no conflict as to the application of the "law of the case" doctrine. Lujan's sole contention in her petition is a distortion of the procedural history of the case—restated over and over as if repetition effects truth. Her claim that the Ninth Circuit failed to follow *Christianson,* which she contends is an applicable and controlling decision of this Court, is entirely lacking in foundation or logic. The Ninth Circuit did not disregard or ignore the law of the case doctrine; rather, it explicitly held that *Lujan II* had not ruled on the § 3730(b)(5) issue. Therefore, *Christianson* was not remotely on point, and there was no law of the case to which the Ninth Circuit could adhere.

Rather than presenting a conflict as to how courts interpret the law of the case doctrine, Lujan's petition, at best, merely challenges whether there was a correct *factual* basis for the Ninth Circuit's holding in *Lujan III* that it was not precluded by the language of its earlier decision in *Lujan*

II from considering the first-to-file question. Such benign claims do not warrant the granting of the writ.

I.

THE NINTH CIRCUIT DID NOT DISREGARD THE LAW OF THE CASE DOCTRINE OR THE *CHRISTIANSON* DECISION

Lujan contends that the Ninth Circuit disregarded the controlling law of the case decision of *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Petition at 7. Lujan maintains that *Lujan II's* holding that her claims were not jurisdictionally barred by the public disclosure / original source provision (§ 3730(e)(4)), constitutes an implicit holding that her action necessarily survives any and all other jurisdictional challenges.

This argument is based on her self-serving view, repeated throughout the petition, that *Lujan II* found "that there was subject matter jurisdiction." Petition at 4. She ignores that this finding was expressly limited to the jurisdictional challenge which had been brought under the public disclosure / original source provision (§ 3730(e)(4)). She puts forth an erroneous legal argument that, because Hughes had included the first-to-file (§ 3730(b)(5)) argument in its *Lujan II* brief, the court must have rejected that argument, albeit silently.

Lujan fundamentally misconstrues the *Lujan II* holding. The Ninth Circuit never ruled on the first-to-file question in *Lujan II.* Thus, there was no law of the case or *Christianson* precedent to apply in *Lujan III.* In *Lujan III*, the Ninth Circuit articulated this with certainty:

> While Hughes argued a 3730(b)(5) jurisdictional challenge to this court [in *Lujan II*], we did not explicitly or implicitly decide that issue. Therefore, the law of the case did not foreclose consideration of the 3730(b)(5) jurisdiction issue.

Lujan III, 243 F.3d at 1187. Lujan has no basis to argue that the Ninth Circuit failed to adhere to the law of the case or to the rule of precedential authority set forth in *Christianson* because those rules had no application to begin with in this case.

Lujan's petition, in reality, is challenging only the Ninth Circuit's interpretation of its own prior mandate; *i.e.*, *Lujan III's* interpretation of what had been decided and not decided by *Lujan II*. Even if such a challenge had some factual basis – which it does not – it presents merely an insular and local question lacking any compelling reason for the intervention of this Court. *See Laitram Corp. v. NEC Corp.*, 115 F.3d 947, 950 (Fed. Cir. 1997) (appellate court has plenary power to construe its own mandate) *citing In re Sanford Fork & Tool Co.*, 160 U.S. 247, 256 (1895); *Burton v. Johnson*, 975 F.2d 690, 693 (10th Cir. 1992) *cert. denied* 507 U.S. 1043 (1993) (same).

A. The Language of *Lujan II* Makes It Clear That The Court Had Not Addressed Or In Any Way Decided The First-To-File Issue

The *Lujan III* panel correctly interpreted the plain language of the *Lujan II* opinion. *Lujan III* completely rejected Lujan's baseless argument that all FCA jurisdictional challenges were necessarily decided by the Ninth Circuit's limited holding in *Lujan II*. The *Lujan II* panel remanded the case because "the District Court has subject matter jurisdiction under the 'original source' exception to the 1986 FCA." *Lujan II*, 162 F.3d at 1034. The court did not say, as Lujan imagines, that it thereby rejected any and all other jurisdictional challenges or other defenses available to Hughes.

The Ninth Circuit specifically limited its ruling to the § 3730(e)(4) bar. Because there is no "original source"

exception to the first-to-file rule, the court could not possibly have been addressing that rule when it found her to be an "original source."[7] *See* § 3730(e)(4); *Lujan III*, 243 F.3d at 1187. There was no ruling—*sub silentio*, implicit or otherwise—on the 3730(b)(5) / first-to-file issue, as Lujan contends. Petition at 6. The Ninth Circuit expressly limited its holding with respect to the public disclosure / original source provision of § 3730(e)(4).

Lujan asserts that *Lujan II* must have decided the first-to-file issue because it was obligated (or as she says "duty bound") to do so. Petition at 9. However, the *Lujan II* panel was under no such obligation.[8] The unique procedural context of the *Lujan II* appeal, described in detail above, shows why the first-to-file issue was not before the *Lujan II* panel. In sum, the key reason it was not before that panel was that it had not yet been addressed by the District Court. The reason it had not yet been addressed by the District Court is that the *Lujan I* mandate had explicitly directed the District Court to rule on whether her action was barred by the

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[7] It is also clear that the first-to-file rule was not decided in *Lujan II*, because it contains elements and presents a set of questions which are distinct from those presented under the public disclosure / original source rule. *See e.g., United States ex rel. La Corte v. SmithKline Beecham Clinical Laboratories*, 149 F.3d 227, 232-33 (3rd Cir. 1998).

[8] Lujan cites to *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765, 768 (2000), apparently in support of this errant "duty bound" notion. *Stevens*, however, simply notes that questions of jurisdiction "should" receive priority before a court reaches a *constitutional* issue (in that case the question of whether the action against the state agency was barred under the Eleventh Amendment). *Id. Stevens* does not stand for Lujan's expansive proposition that a court must consider all jurisdictional challenges simultaneously – even jurisdictional challenges which are not yet properly before the court – or else lose the opportunity to address them.

public disclosure / original source provision (§ 3730(e)(4)). *Lujan I*, 67 F.3d at 248. The District Court took that directive literally and ordered the parties to brief only that particular issue. *See* Resp. App. at 1-2. Consequently, that was the only issue briefed by the parties and decided by the District Court at that time.

When the public disclosure / original source dismissal came up for review in *Lujan II*, the Ninth Circuit had no basis to address the first-to-file issue because it had not been part of the District Court's determination. *See Sprague v. Ticonic Nat'l Bank*, 307 U.S. 161, 168 (1939) (issues before appellate court are limited to those "disposed of in the main litigation"); *Engel Industries, Inc. v. Lockformer Co.*, 166 F.3d 1379, 1382 (Fed. Cir. 1999) ("The scope of issues presented to [the appellate court] on appeal must be measured by the scope of the judgment appealed from . . . ."). Accordingly, the *Lujan II* panel had only the public disclosure bar/original source exception issue properly before it.

Notwithstanding that Hughes raised the first-to-file issue (§ 3730(b)(5)) for the first time in its brief in *Lujan II*, and repeated the issue at oral argument, the *Lujan II* panel still was not obligated to and, more importantly, did not address that issue in any way, shape or form.[2] The *Lujan II* ruling on the public disclosure / original source issue did not remotely suggest that the court also ruled on the first-to-file

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[2] Hughes had suggested in *Lujan II* that the first-to-file rule would be an alternative basis for upholding the dismissal of the action. Although consideration of that issue in *Lujan II* would have expedited the litigation by avoiding another trip to the District Court, the Ninth Circuit was not obligated to short-cut the process. Indeed, as the District Court later noted, it was "much more likely that the Ninth Circuit merely preferred to have the district court address this issue first before making its determination." Resp. App. at 14.

issue. Therefore, the decision did not establish any law of the case with respect to the first-to-file rule. *See United States v. Cote*, 51 F.3d at 181 (holding that law of the case preclusions "clearly do[] not extend to issues an appellate court did not address"). Indeed, as occurred here, "[q]uestions that merely could have been decided do not become law of the case." *Bouchet v. National Urban League, Inc.*, 730 F.2d 799, 806 (D.C. Cir. 1984). The Ninth Circuit's *opportunity* to address § 3730(b)(5) did not transform into an *actual resolution* of the issue.

B. *Christianson* Does Not Control *Lujan III*

Lujan insists that *Christianson* stands for the proposition that a decision by a court to transfer or remand a case to another court "necessarily involves a decision that the recipient court has jurisdiction." Petition at 7. According to Lujan, then, the court's remand in *Lujan II* was an automatic holding that no other jurisdictional challenges could ever be raised in the case. Lujan's reading of *Christianson* is wrong. Moreover, the circumstances and the holding of *Christianson* are distinguishable from the instant action on several levels, and therefore *Christianson* is not controlling in the instant action.

The particular jurisdiction issue in *Christianson* was whether the proper forum for the action was the Federal Circuit under its patent law jurisdiction (28 U.S.C. §§ 1295, 1338). That issue was fully briefed by the parties, and the Federal Circuit expressly decided that it did not have patent law jurisdiction. Accordingly, it transferred the case to the Seventh Circuit. The Federal Circuit's transfer order did not bother to explain why there was no jurisdiction because it expected "that the parties and others interested would recognize that it was based on the reasons and authorities set forth in the movant's brief." *Christianson v. Colt Indus. Operating Corp.*, 822 F.2d 1544, 1549 (Fed. Cir. 1987).

When the Seventh Circuit received the transferred case, it revisited the exact same jurisdiction question and

held that the Federal Circuit was wrong and that the Federal Circuit did have patent law jurisdiction. The Seventh Circuit then transferred the case back to the Federal Circuit. *See Christianson v. Colt Indus. Operating Corp.*, 798 F.2d 1051, 1056-57, n.4 (7th Cir. 1984).

When the matter reached the Supreme Court, the Court held that it was improper for the Seventh Circuit to have revisited the Federal Circuit's determination of lack of jurisdiction. *Christianson*, 486 U.S. at 817. The Federal Circuit's decision was the law of the case, and the Seventh Circuit was not empowered to reverse that decision. *Id.* Thus, *Christianson* applied the law of the case doctrine in the unique setting of an inter-circuit transfer.[10]

The particular circumstance in *Christianson* is not remotely relevant to what occurred in this instant action where the District Court and then the Ninth Circuit simply interpreted the scope of the Ninth Circuit's prior mandate. In invoking *Christianson*, Lujan again imagines a holding that is not in that decision.

The Federal Circuit in *Christianson,* did not "implicitly or necessarily" decide the jurisdiction challenge that was before it; the Federal Circuit decided the question explicitly. Nevertheless, Lujan seizes upon the fact that the Federal Circuit's transfer order did not explain the court's reasoning. From this, Lujan draws the unfounded conclusion that the Supreme Court adopted a universal rule that *every* aspect of jurisdiction must necessarily be decided by

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10 *See Christianson*, 486 U.S. at 816 ("[T]he policies supporting the [law of the case] doctrine apply with even greater force to transfer decisions than to decisions of substantive law; transferee courts that feel entirely free to revisit transfer decisions of a coordinate court threaten to send litigants into a vicious circle of litigation").

implication in any remand decision involving a question of jurisdiction. *See* Petition at 7 (arguing that *Christianson* is "controlling and dispositive authority that in remanding Lujan's qui tam claims to the District Court in 1998, *Lujan II* had implicitly decided and rejected Hughes' § 3730(b)(5) jurisdictional challenge").

Instead, *Christianson* stands for the limited principle that the law of the case will apply to an actual decision on jurisdiction which results in an inter-circuit transfer of jurisdiction. *Christianson* does not hold that all potential statutory jurisdictional challenges are necessarily decided upon a remand to a district court where the appellate court ruled upon a narrow and separate jurisdictional challenge.[11] Simply put, *Christianson* has no bearing upon *Lujan III.*

II.

NO CIRCUIT CONFLICT EXISTS REGARDING THE APPLICATION OF *CHRISTIANSON*

Review by this Court is not warranted where there is no significant split in circuit decisions. S.Ct. Rule 10; *NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498 (1951) (noting that *certiorari* is granted only in cases where there is "a real and

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[11] Even if the Ninth Circuit had misapplied *Christianson* as Lujan contends, *certiorari* still is not warranted because she does not charge that the Ninth Circuit stated an improper rule of law. Her contention is merely that the court misapplied a rule of law. Petition at 9. She further asserts that "Neither of the two [manifest injustice] prongs were satisfied here" (Petition at 10), and that this Court should now make a "proper determination" regarding the manifest justice exception to correct the Ninth Circuit misapplication (Petition at 16). Rule 10 provides that "*certiorari* is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." From such insignificant seeds, Supreme Court cases should not flourish.

embarrassing conflict of opinion and authority" between the circuits). In her desperate attempt to meet this standard, Lujan invents a "split" where there is none. *See* Petition at 6 ("there is a clear and acknowledged split among the circuits on whether *Christianson* is confined solely to instances in which a court of appeals orders a transfer or whether its scope is broader").

Lujan contends that there is a "split of authority in the federal circuits regarding the law of the case doctrine." Petition at 8. The purported "split" which Lujan mischaracterizes involves a Third Circuit case which stated that "*Christianson's* discussion of the law of the case, as it relates to jurisdiction . . . appl[ies] only to transfer cases and not to cases that raise serious jurisdictional concerns." Petition at 8, *quoting Public Interest Research Group of New Jersey, Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 118 (3rd Cir. 1997). Lujan further quotes the Third Circuit as recognizing that two other circuits have held that the law of the case doctrine is not limited to inter-circuit transfer cases but applies generally to decisions involving subject matter jurisdiction. Petition at 8.

Notwithstanding the Third Circuit's observation about the application of *Christianson* in two other circuits, the Third Circuit simply ruled that the law of the case did not apply to the specific jurisdictional question at issue in that case because of "extraordinary circumstances;" *i.e.*, the presentation of new evidence. *Public Interest*, 123 F.3d at 118. In that regard, the Third Circuit did not disagree with its sister circuits; rather, it found that the law of the case did not apply in the factual circumstances under consideration: "[W]e do not think that law of the case is applicable in this instance to prevent our reconsideration of standing, particularly in view of the fact that new evidence . . . was presented to the district court which had a direct bearing on the issue of standing" *Id.*

Thus, *Public Interest* did not create a split of authority among the circuits. But even if there were such a

split as Lujan contends, it would have no bearing whatsoever on the *Lujan III* decision. The Ninth Circuit did not split from any circuit--or ignore any circuit split--concerning *Christianson*. The scope of *Christianson* was never before the Ninth Circuit in *Lujan III*. Indeed, the Ninth Circuit--like the Third Circuit in *Public Interest*--found that the law of the case doctrine did not apply to the jurisdiction question because it did not operate as "to issues not addressed by the appellate court." *Lujan III*, 243 F.3d at 1190. Neither *Lujan III* nor *Public Interest* conflict with *Christianson* which held that for the law of the case doctrine to apply, "the issue in question must have been decided explicitly or by necessary implication in [the] previous action." 486 U.S. at 815-16.

Lujan III's straightforward determination that there was no prior law of the case in this instance put that issue completely outside the scope of *Christianson*. Thus, the Ninth Circuit decision did not conflict with any other circuit on the question, and there is no "split" arising from *Lujan III*.

III.

LUJAN'S CLAIM THAT THE *SCHUMER* ACTION WAS NEVER "PENDING" WITHIN THE MEANING OF THE FCA IS UNSUPPORTED AND DOES NOT COMPEL GRANTING THE WRIT

Lujan's asserts (Petition at 11), that the disposition of the *Schumer* action rendered it a "nullity," and therefore *Schumer* was never a "pending" action, as that term is used in § 3730(b)(5) (". . . no person may bring a related action based on facts underlying *the pending action*") (emphasis added). Lujan's assertions are based on her misstatements of

the facts and procedural history of the *Schumer* action.[12] They raise no circuit conflict or otherwise frame instances in which the Ninth Circuit departed from "the accepted and usual course of judicial proceedings." S.Ct. Rule 10(a).

A. *Schumer* Was Never a "Nullity"

Lujan's assertion that Schumer's action was dismissed for lack of jurisdiction is a false representation of the outcome of that action. As described in detail above, this Court's holding in *Schumer* that the District Court lacked jurisdiction—the ruling upon which Petitioner relies for its "nullity" argument—applied only to Schumer's pre-1986 allegations. This Court's ruling in *Schumer* left untouched Schumer's post-1986 claims which the District Court had dismissed as a result of summary judgment on the merits. Because the Ninth Circuit had affirmed the dismissal on the merits of Schumer's post-1986 claims, they were not within the scope of Hughes' appeal to the Supreme Court and consequently were not disposed of on grounds of lack of jurisdiction. *See Schumer*, 63 F.3d at 1528.

Thus, the procedural record of *Schumer* demonstrates that it was not transformed into a "nullity" by this Court on the basis of a jurisdictional defect, because that defect was applied only to Schumer's pre-1986 claims. Moreover, with regard to Lujan's novel argument that a case which is dismissed in its entirety for lack of jurisdiction should not be considered as a "pending action" for purposes of § 3730(b)(5)'s first-to-file rule, Hughes notes that no court has ever made such a ruling.

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12 Hughes' counsel in the instant action also represented Hughes in the *Schumer* action before the District Court and the Ninth Circuit.

Not only does Lujan blatantly misapply the facts on this issue, she relies, as she did before the Ninth Circuit, upon an inapposite and unpublished non-FCA case, *Drake v. Cheney*, No. 91-1553, 1992 U.S. App. LEXIS 7298 (4th Cir. 1992), whose use the Fourth Circuit expressly disfavors. Petition at 10; Fourth Cir. R. 36(c).[13].

B. Lujan's Interpretation of "Pending" Contorts FCA Policy

Lujan contends that once a qui tam case is over, the first-to-file rule no longer applies, and a subsequent relator is invited to file a second duplicate action. Petition at 12-13. In that regard, she asserts that a case that is ended can no longer be deemed to have been "pending." Lujan's contorted interpretation of the term "pending" conflicts with the basic purposes of the statutory limitations on who can properly bring a qui tam action under the FCA. Indeed, Lujan's view is nonsensical.

The FCA was intended to prevent duplicative lawsuits and class actions. *See* Senate Report No. 99-345, 99th Cong. 2nd Sess. 6, *reprinted in* 1986 U.S.C.C.A.N. 5266, 5290; *United States ex rel. Stinson, Lyons et al. v. Prudential Insurance*, 944 F.2d 1149, 1154 (3d Cir. 1991). Section

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13 Curiously, Lujan again relies on *Drake v. Cheney* in spite of the Fourth Circuit Rule disfavoring such reliance while, at the same time, criticizing the *Lujan III* court for "relying" upon *United States ex rel. Pentagen Technologies International, Ltd. v. CACI International Inc.*, 172 F.3d 39 (2d Cir. 1999), an unpublished Second Circuit opinion. Lujan again makes a blatant mischaracterization. *Lujan III* did not "rely" upon *Pentagen*. The *Lujan III* panel simply noted—in a footnote—that other circuits have not directly decided whether a subsequently dismissed action is "pending" under 3730(b)(5) and indicated-without reliance--that the Second Circuit had referenced the question in an unpublished opinion (*Pentagen*). *Lujan III*, 243 F.3d at 1193, n.11.

3730(b)(5) plainly awards the winner of the race to the courthouse; 3730(b)(5) is a first to file rule. *See Stinson*, 944 F.2d at 1176 n.5 (Scirica, J. dissenting); *see also, United States ex rel. Taxpayers Against Fraud and Walsh v. General Electric Co.*, 41 F.3d 1032, 1035 (6th Cir. 1994) (section 3730(b)(5) bars relator from collecting bounty if someone else filed first claim).

The first to file rule is all the more important as a protection against multiple suits because there can be more than one "original source." *See United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407, 410 (9th Cir. 1993) *cert. denied* 511 U.S. 1033 (1994); *Stinson*, 944 F.2d at 1176, n.5 (Scirica, J. dissenting). Accordingly, Lujan errs in implying that FCA policy regarding 3730(b)(5) is on her side. She asserts that "Congress certainly did not intend that relators should have no bite at the apple." Petition at 13. But Schumer, who was the first-to-file had his bite, and he lost.

Lujan also claims that she is a "proper relator" and that it is a "perverse contention" to preclude her from bringing an action that can benefit the public.[14] Petition at 16 ("nothing supports the perverse contention that Congress intended that a suit that is a nullity should preclude a proper relator from bringing an action that can benefit the public"). This reference to the merits of her claims, while not pertinent to the issue set forth in the petition, is itself baseless. The Government determined long ago that the cost charging in question actually saved the Government money. *See Lujan*

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[14] Such overstatement reflects desperation; it is hardly applicable given that the District Court and all three members of the Ninth Circuit panel found Lujan not to be a proper qui tam relator. Indeed, in the long history of Schumer's and Lujan's actions, fourteen different federal judges have noted that Lujan's allegations mirror those pursued earlier by Schumer.

III, 243 F.3d at 1187, n.10; *Schumer*, 520 U.S. at 942-43, fn.1.

Lujan further asserts that Hughes is not "in any way prejudiced in having to defend against Lujan's qui tam claims." Petition at 15. That is an absurd contention. Hughes would indeed be prejudiced by having to defend a case which it already won.

CONCLUSION

Respondent Hughes Aircraft Company respectfully requests that, for the reasons stated above, this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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October 23, 2001

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. LINDA A. LUJAN, Plaintiffs, v. HUGHES AIRCRAFT CO., Defendant.	CV-92-1282 JMI (SHx) ORDER RE BRIEFING OF ISSUES UPON REMAND (Filed December 13, 1995)

IT IS HEREBY ORDERED:

Upon remand of this action from the Ninth Circuit Court of Appeals, the Court makes the following ruling. As the Ninth Circuit noted, this Court first must determine whether it has jurisdiction. 31 U.S.C. § 3730(e)(4)(A) circumscribes district courts' jurisdiction in qui tam actions by barring suits brought after the allegations in the complaint have been publicly disclosed, unless the relator is the "original source" of the information.

The Ninth Circuit stated that Plaintiff Linda Lujan's ("Lujan") allegations resemble the subject of an earlier qui tam action brought in 1989 by William Schumer ("Schumer"), the former Hughes director of contracts for the B-2. On remand, this Court initially must make a factual inquiry to determine whether the allegations in Lujan's complaint were publicly disclosed by Schumer.

In order to determine this issue, the Court orders the parties to brief this issue. Since Defendant already has filed a short brief discussing this issue, the Court now orders

Defendant to file a complete brief addressing this issue no later than Monday, January 22, 1996. Plaintiffs' response, if any, is due no later than Monday, January 29, 1996. Defendant's reply, if any, is due no later than Monday, February 5, 1996.

After the Court has resolved this issue, it will then set a schedule, if necessary, for any remaining issues.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, ex rel. LINDA A. LUJAN, Plaintiffs, v. HUGHES AIRCRAFT CO., Defendant.	CV-92-1282 JMI (SHx) ORDER DISMISSING RELATOR'S QUI TAM COUNTS (Filed March 19, 1996)

IT IS HEREBY ORDERED:

This Court is in receipt of the parties' briefing re subject matter jurisdiction in the above-entitled action. The Court **DISMISSES** Plaintiff Linda A. Lujan's ("Lujan" or "Relator") *qui tam* counts. Lujan's claim for retaliation remains viable.

BACKGROUND

Lujan worked for Defendant Hughes Aircraft Co. ("Hughes") as an accountant and as a systems analyst. *See* First Amended Complaint ("FAC"), ¶ 12. Lujan filed *qui tam* and retaliation claims against Hughes. Lujan alleges that Hughes mischarged the Government for its work on the B-2 bomber radar systems. The Government declined to intervene. United States *ex rel.* Lujan v. Hughes Aircraft Co., 67 F.3d 242, 244 (9th Cir. 1995).

This Court dismissed Lujan's complaint because Lujan disclosed the nature and existence of her *qui tam* claim to the Los Angeles Times while the complaint was still under

seal. Lujan's action clearly violated the seal provisions of 31 U.S.C. § 3730(b)(2). *Id.*

However, this Court did not explicitly discuss the authority upon which it rested its decision to dismiss. As such, the Ninth Circuit's holding requires this Court to evaluate several factors in determining the appropriate sanction.[1]

But, the Ninth Circuit noted that this Court first must determine whether it has jurisdiction. *Id.* at 248. Section 3730(e)(4)(A) of the False Claims Act circumscribes district courts' jurisdiction in *qui tam* actions by barring suits brought after the allegations in the complaint have been publicly disclosed, unless the relator is the "original source" of the information. *See* 31 U.S.C. § 3730(e)(4)(A)-(B).

The Ninth Circuit stated that Lujan's allegations resemble the subject of an earlier *qui tam* action brought in 1989 by William Schumer, the former Hughes director of contracts for the B-2. Lujan, 67 F.3d at 248. On remand, this Court initially must make a factual inquiry to determine whether the allegations in Lujan's complaint were publicly disclosed by Schumer. *Id.*

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[1] Factors to consider under the false Claims Act include: (1) harm to the government; (2) nature of the violation, (3) presence or absence of bad faith or willfulness. Factors to consider under the Court's inherent power to dismiss an action include: (1) the existence of extraordinary circumstances, (2) bad faith or willfulness, (3) efficacy of lesser sanctions, (4) relationship between the misconduct and the matters in controversy, (5) prejudice to the party victim of the misconduct, and (6) government interests at stake. Lujan, 67 F.3d at 245-48.

DISCUSSION

A. The operative complaint for review is Plaintiff's First Amended Complaint.

Hughes strenuously argues that the relevant complaint for review is the original one, not the first amended one. Hughes is wrong.

Hughes argues that since the Court never had subject matter jurisdiction over the original complaint, a fortiori this Court lacks jurisdiction over the amended complaint. Hughes also maintains that Lujan's independent retaliation claim, 31 U.S.C. § 3730(h), fails to confer subject matter jurisdiction upon this Court. But, Hughes offers neither support nor cogent reasoning to support either assertion.

Moreover, Hughes' assertion appears somewhat disingenuous in light of the fact that one of Hughes' briefs submitted before the Ninth Circuit stated that "Hughes maintains that the operative complaint for determining the jurisdictional issue is the First Amended Complaint." *See* Appellee Hughes Aircraft Company's Supplemental Brief on Issue of Jurisdictional Bar Under 31 U.S.C. § 3730(e)(4)(A), p. 4 n.5.

In sum, the Court's analysis is based on Lujan's First Amended Complaint, as the retaliation claim itself is, and always has been, an independent jurisdictional basis. *See* 31 U.S.C. § 3730(h) ("An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection); 28 U.S.C. § 1331.

B. Jurisdictional statute's interpretation

The relevant jurisdictional statute at issue is 31 U.S.C. § 3730(e)(4), which provides:

> (A) No court shall have jurisdiction over an action under this section based upon the

> public disclosure of allegations or transactions in a criminal, civil, or administrative hearing . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under the section which is based on the information.

In interpreting such a jurisdictional statute, the Court is mindful that "statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." United States *ex rel.* Precision Co. v. Koch Industries, 971 F.2d 548, 552 (10th Cir. 1992) (citation omitted).

1. "Based upon"

In interpreting this statute, several legal formulations have evolved to determine when one relator's allegations are "based upon" another relator's earlier allegations. For example, the Ninth Circuit has stated that "based upon" means when "fairly characterized[,] the allegation repeats what the public already knows." United States *ex rel.* Wang v. FMC Corp., 975 F.2d 1412, 1417 (9th Cir. 1992). Another circuit has held that a relator's disclosures are "based upon" previous disclosures if they are "based in any part" on the prior allegations. Koch Industries, 971 F.2d at 553.

2. "Publicly disclosed"

Allegations or transactions are publicly disclosed if they are transmitted or available not only through newspapers, radio and other mass media outlets, but also

through court files and court-filed discovery. *See* United States *ex rel.* Kreindler v. United Technologies, 985 F.2d 1148, 1158 (2d Cir. 1993); United States *ex rel.* Schumer v. Hughes Aircraft, 63 F.3d 1512, 1519-20 (9th Cir. 1995).

3. Analytical framework

Applying the aforementioned definitional frameworks, the Ninth Circuit has promulgated the following rule:

> If [] someone republishes an allegation that already has been publicly disclosed, he cannot bring a *qui tam* suit, even if he had "direct and independent knowledge" of the fraud. He is no "whistleblower." A "whistleblower" sounds the alarm; he does not echo it. The Act rewards those brave enough to speak in the face of a "conspiracy of silence,"[2] and not their mimics.

Wang, 975 F.2d at 1419 (citations omitted).

C. Lujan echoed Schumer's allegations

Relator Lujan's *qui tam* allegations are substantially similar to Schumer's previous claims. Lujan attempts to distinguish her allegations by stating that they involve mischarging within the B-2 program, while Schumer addressed cost shifting among the B-2 program and other aircrafts.[3] However, upon reviewing the allegations previously brought forth by Schumer, the Court finds that Lujan's allegations are simply a variation on Schumer's.

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[2] The parties do not dispute that Lujan has direct and independent knowledge of her allegations.

[3] These aircrafts are the F-14D, the F-15 MSIP, and the F-18.

Schumer's claims, like Lujan's, involve the B-2 bomber system, which was a massive, billion dollar contract. With such large stakes at hand, the government necessarily performed a thorough review of Schumer's claims as evidenced by the Schumer records and proceedings. Lujan now seeks to create a meaningless distinction between her claims and Schumer's in order to further the government's, and her, interests.

To give credence to Lujan's microscopically fine distinctions between her allegations and those of Schumer would do injustice to the purposes underlying the False Claims Act. Wang, 975 F.2d at 1419 (citations omitted). It is the harbinger, not the mimic, who is entitled to champion the government's interests. In sum, the Court DISMISSES all of Lujan's *qui tam* claims.

Lujan's claim for retaliation under 31 U.S.C. § 3730(h) remains viable.

IT IS SO ORDERED.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, *ex rel.* LINDA A. LUJAN, Relator, v. HUGHES AIRCRAFT COMPANY, Defendant.	CV-92-1282 SVW ORDER GRANTING DEFENDANT'S MOTION TO DISMISS (Filed January 20, 2000)

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

I. Background

Hughes Aircraft Company ("Hughes") is presently moving to dismiss Linda Lujan's ("Lujan") qui tam action, arguing that it is barred by section 3730(b)(5) of the False Claims Act ("FCA") which prohibits any person other than the government from bringing a related action based on the facts underlying a qui tam action that has been previously filed. *See* 31 U.S.C. § 3730(b)(5). Hughes contends that Lujan's action is related to a previously filed qui tam action brought by William Schumer in 1989 ("Schumer action"). Because of the importance of Schumer's action to the present motion, the history of the Schumer Case is provided below.

A. The Schumer Action

Schumer's action alleged that Hughes had mis-charged costs on the radar systems of four different aircraft

programs — the B-2, F-15, F-14 and F-18 — during its participation as a defense contractor between 1982 and 1990. Schumer alleged that Hughes used cost sharing agreements called "commonality agreements" to shift costs from "fixed-priced" contracts to "cost reimbursement" contracts. The government conducted an audit of this practice in 1986 and 1988 and concluded that Hughes had overcharged the government. However, in 1989-90, the government reversed its earlier findings and determined that Hughes' commonality agreements were proper and actually saved the government money.

On May 20, 1992, Judge Pfaelzer granted summary judgment in favor of Hughes, finding that "Schumer has not shown that Hughes violated the False Claims Act." On appeal, the Ninth Circuit affirmed most of Judge Pfaelzer's findings, remanding only on two narrow issues concerning Hughes conduct prior to 1986: (1) whether Hughes failed to timely disclose the 1982 commonality agreement to Northrop, and (2) whether Hughes failed to reflect the commonality charging practice in its accounting disclosure statement to the Government between December 1982 and January 1984. *See* United States *ex rel.* Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1523-23 (9th Cir. 1995).

When Schumer appealed the grant of summary judgment to the Ninth Circuit, Hughes cross-appealed on another issue. Hughes had argued unsuccessfully in the district court that because government auditors had alleged the same mischarging prior to Schumer filing his action, the action was barred under the "government knowledge" defense. 31 U.S.C. § 3730(b)(4) (1982). This defense was eliminated by the 1986 amendments to the FCA. However, Hughes argued that the amendments should not be applied retroactively to Hughes' pre-1986 conduct. The Ninth Circuit disagreed with Hughes and held that the 1986 Amendment which eliminated the government knowledge defense applied retroactively to Hughes' pre-1986 conduct because it did not affect a "substantive right." United States *ex rel.* Schumer, 63 F.3d at 1516-17.

Hughes appealed to the Supreme Court, and certiorari was granted with respect to: (1) whether the 1986 Amendments applied to pre-1986 conduct, (2) whether any of Schumer's claims were jurisdictionally barred by the Public Disclosure provisions of the FCA, and (3) whether the two issues that the Ninth Circuit had remanded — concerning the alleged disclosure infractions from 1982-84 — could possibly give rise to a FCA violation in view of the government's determination that there was no financial harm to the government.

The Supreme Court held that the 1986 amendments did not apply retroactively and thus, Schumer's pre-1986 claims were barred by the government knowledge defense which was present in the 1982 version of the FCA. Because the only claims remaining after the Ninth Circuit's ruling were pre-1986 claims, the entire case had to be dismissed. Therefore, the Supreme Court declined to reach the remaining issues presented for review.

B. Lujan's Action

Lujan filed this *qui tam* action against her previous employer, Hughes, in 1992. Like Schumer, she alleged that Hughes submitted false claims to the government during its participation as a defense contractor in the B2 bomber and other projects between 1982 and 1989.

Apparently, soon after filing the action, Lujan's previous counsel brought the case to the attention of the media, in violation of the 60-day sealing provision in the statute. Hughes brought a motion to dismiss the action based on this violation. Judge Ideman, who previously had this case, granted dismissal on that basis.

The Ninth Circuit reversed Judge Ideman's decision, directing the district court to evaluate whether a lesser sanction may have been appropriate and providing some guidelines for this inquiry. In addition, the Ninth Circuit noted that this action appeared to be quite similar to the

Schumer action and, *sua sponte*, directed the district court to consider whether Lujan's case was jurisdictionally barred based on § 3730(e)(4) of the False Claims Act.

Section 3730(e)(4) is a jurisdictional provision that bars qui tam actions which are "substantially similar" to allegations that were previously disclosed to the public. The Ninth Circuit directed the district court to consider whether the Schumer action resulted in public disclosure of the allegations in Lujan's action and therefore barred the Lujan action.

The district court directed the parties to brief the "public disclosure" issue and eventually dismissed Lujan's action for lack of subject matter jurisdiction based on § 3730(e)(4). On appeal, the Ninth Circuit reversed the district court's decision, finding that while the Schumer action was substantially similar to the Lujan action and thus, the Schumer action constituted public disclosure of Lujan's allegations, Lujan's action was not barred because Lujan fell within the exception to the public disclosure rule because she was an "original source" of the allegations. The Ninth Circuit also determined that Lujan could only maintain allegations arising from false claims submitted by Hughes after 1986. This ruling was based on the Supreme Court's decision in Schumer which held that the 1986 amendments to the FCA did not apply retroactively and thus, false claims which arose prior to 1986 were subject to the 1982 jurisdictional provisions which barred claims based upon information of which the government was already aware.

At this point Lujan's case has been remanded once again from the Ninth Circuit. Lujan's allegations have been limited by the Ninth Circuit to allegedly false claims submitted by Hughes between 1986 and 1989. Defendant Hughes now brings another motion to dismiss based on lack of subject matter jurisdiction under § 3730(b)(5) of the FCA, res judicata, and collateral estoppel.

II. Lujan's Action Is Barred By Section 3730(b)(5)

A. Section 3730(b)(5)

Section 3730(b)(5) states: "When a person brings an action under this subsection, no person other than the Government may intervene or bring a related action based on the facts underlying the pending action." (emphasis added)

B. The Ninth Circuit Did Not Implicitly Reject Hughes' Section 3730(b)(5) Defense

Lujan argues that Hughes already presented this jurisdictional defense to the district court and the Ninth Circuit and lost. Therefore, Lujan contends, Hughes is barred from rearguing the issue now. Lujan's contentions are based on the fact that Hughes argued this issue to the district court and the Ninth Circuit. However, a look at the interesting manner in which this issue arose, coupled with a close reading of the district court and Ninth Circuit orders, makes clear that neither court addressed or "implicitly" decided this issue.

As discussed previously, when the Ninth Circuit reversed the district court's dismissal based on violation of the sealing provision, it directed the district court to consider whether Lujan's action was barred based on lack of subject matter jurisdiction under section 3730(e)(4) because the allegations in Lujan's complaint were similar to those publicly disclosed in the Schumer action. In the district court's "Order Re Briefing of Issues Upon Remand," the parties were directed to brief this specific issue. The district court granted dismissal based on lack of subject matter jurisdiction pursuant to § 3730(e)(4). Regardless of whether Hughes attempted to argue that the case should have been dismissed based on lack of subject matter jurisdiction under § 3730(b)(5) as well, it is clear that the district court based its decision solely on § 3730(e)(4) and did not mention or discuss § 3730(b)(5).

When the dismissal was appealed to the Ninth Circuit, subject matter jurisdiction under § 3730(e)(4) was the only issue squarely presented. While Hughes may have attempted to raise a § 3730(b)(5) argument in its brief and oral argument to the Ninth Circuit, there is no indication in the Ninth Circuit's opinion that it considered the § 3730(b)(5) issue in rendering its decision that subject matter jurisdiction did exist under § 3730(e)(4).

Plaintiff argues that the Ninth Circuit's very silence implies that it rejected the defendant's argument. However, it is much more likely that the Ninth Circuit merely preferred to have the district court address this issue first before making its determination. Therefore, this court does not find Lujan's contention that the Ninth Circuit implicitly rejected Hughes § 3730(b)(5) persuasive.

C. Section 3730(b)(5) Applies To This Action Because Schumer's Action Was Pending At The Time Lujan Filed Her Case

Plaintiff argues that § 3730(b)(5) applies only when another action is "pending" and that because Schumer's action was dismissed in 1997, there is no action pending which would bar Lujan's action. This argument is disingenuous.

Schumer's action was pending at the time that Lujan filed her claim. Therefore, under the plain meaning of the statute, Lujan's action is barred if the Court determines that it is related to the Schumer action because Lujan brought this lawsuit while the Schumer action was pending. Plaintiff's suggested interpretation of § 3730(b)(5) would strip the provision of meaning since both the case law and legislative history of the FCA support the interpretation that § 3730(b)(5) was intended to create a "first to file" rule which would prevent multiple separate suits based on the same claims. *See, e.g.*, United States *ex rel.* Erickson v. American Institute of Biological Sciences, 716 F. Supp. 908, 918 (E.D. Va. 1989). To allow subsequent qui tam lawsuits

to be filed as long as the previously-filed qui tam actions had been dismissed would be entirely contrary to the goals of § 3730(b)(5). Thus, the Court rejects this argument.

D. Lujan's Claims Are Related To Schumer's Claims

1. Standard For Determining Related Claims Under Section 3730(b)(5)

Section 3730(b)(5) has been interpreted as a "first to file" rule which sets a jurisdictional bar to any related *qui tam* action. *See* United States *ex rel.* Erickson v. American Inst. of Biological Sciences, 716 F. Supp. 908, 918-19 (E.D. Va. 1989). One of the purposes of the 1986 amendments, which altered the jurisdictional barriers to bringing a qui tam lawsuit, was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 345, 99th Cong., 2d Sess. 1, *reprinted in* 1986 U.S.C.C.A.N. at 5266. The amendments were also an attempt "to clarify in the statute that private enforcement under the civil False Claims Act is not meant to produce class actions or multiple separate suits based on identical facts and circumstances." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6290, *see also* United States *ex rel.* Taxpayers Against Fraud and Walsh v. General Electric Company, 41 F.3d 1032, 1035 (6th Cir. 1994).

While courts have been anything but uniform in interpreting what constitutes a related case under section 3730(b)(5), most courts have rejected an identical facts test. *See* United States *ex rel.* Capella v. United Technologies Corp., 1999 W.L. 464546 at *8 (D. Conn. June 3, 1999) (analyzing tests applied by other courts). The Third Circuit's test focuses on whether the "later filed allegation states all the essential facts of a previously-filed claim." United States *ex rel.* LaCorte v. Smithkline Beecham Clinical Laboratories, Inc., 149 F.3d 227, 232-33 (3d Cir. 1998). If the claim is based on the same essential facts or circumstances, it is barred regardless of the fact that the allegations

"incorporate[] somewhat different details." *Id.* Similarly, Judge Kenyon, of the Central District of California, concluded that § 3730(b)(5) bars claims to the extent that they raise "issues which were the subject of the [prior action]." Hyatt v. Northrop Corp., 1989 U.S. Dist. LEXIS 18941, at *2. The Eleventh Circuit has also indicated, although in dicta, that qui tam cases based on "the same type of conduct would be barred." United States *ex rel.* Cooper v. Blue Cross and Blue Shield of Florida, Inc., 19 F.3d 562, 567 (11th Cir. 1994). In United States *ex rel.* Erickson, a lower court in Virginia adopted a somewhat different two-part test under § 3730(b)(5): "A subsequently filed qui tam suit may continue only to the extent that it is (a) based on facts different from those alleged in the prior suit and (b) gives rise to a separate and distinct recovery by the government." 716 F. Supp. at 918. While all of these cases apply a somewhat different standard in determining whether a subsequently filed qui tam case is barred under § 3730(b)(5), "they contain one common principle – section 3730(b)(5) precludes a subsequent relator's claim that alleges the defendant engaged in the same type of wrongdoing as that claimed in a prior action even if the allegations cover a different time period or location within a company." United States *ex rel.* Capella v. United Technologies Corp., 1999 WL 464536, *9 (D. Conn. June 3, 1999).[1]

The First Circuit has adopted quite a different approach: "We think a court should look first to whether the

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[1] Lujan argues that section 3730(b)(5) only precludes a subsequently filed qui tam suit based on identical facts. Plaintiff relies solely on United States *ex rel.* Dorsey v. Warren E. Smith Community Health/Mental Retardation & Substance Abuse Centers, C.A. No. 95-7446, 1997 U.S. Dist. LEXIS 9424 (E.D. Pa. June 25, 1997) for this proposition. Dorsey appears to be the only court to have adopted such a stringent standard and it seems that Dorsey is no longer good law since more recent Third Circuit opinion in LaCorte appears to overrule it.

two cases can properly be seen as having a host-parasite relationship. In answering the question, we think it would be useful . . . [to] ask whether the qui tam case is receiving 'support, advantage, or the like' from the host case. . . ." United States *ex rel.* S. Prawer & Co. v. Fleet Bank of Maine, 24 F.3d 320, 327 (1st Cir. 1994) (internal citations omitted). The First Circuit's analysis was in connection with § 3730(e)(3) which bars a qui tam suit based upon transactions or allegations which are the subject of another suit in which the government is a party. However, the same analysis could clearly apply under § 3730(b)(5) and, in fact, one district court has held that this host-parasite analysis may be useful in analyzing § 3730(b)(5) cases. *See* Capella, 1999 WL 464536, *8-9. The First Circuit indicated that where a host-parasite relationship was found, an identity between the later filed qui tam action (the "parasite") and the earlier case (the "host") could be presumed, while the lack of a host-parasite relationship would indicate there was no identity between the two cases. *Id.* at 328.

While the Court agrees that the existence of a host-parasite type relationship might generally be indicative of whether the later filed qui tam action is "related to" or based upon the same facts as the previously filed case, the Court does not find this test particularly helpful. Under this test, two or even ten relators who had independent knowledge of a scheme to submit false claims to the government could all file suit based on identical facts. None of the relators would be receiving support or advantage from any of the other relators because of their independent knowledge. Therefore, no host-parasite relationship would exist and, under the First Circuit's test, all cases could logically go forward. However, § 3730(b)(5), unlike the public disclosure jurisdictional bar found in § 3730(e)(4), contains no exception for relators who are deemed to be an "original source" of the allegations. Therefore, the hypothetical identical suits should clearly be barred from going forward under a plain reading of the § 3730(b)(5).

The Court finds the Third Circuit's test and reasoning set forth in the LaCorte decision more persuasive. The Court agrees that,

> [A]s a matter of fairness claimants alleging the same material facts as prior relators should not share in a qui tam award, because their allegations are unlikely to increase the total recovery. In addition, such duplicative claims do not help reduce fraud or return funds to the federal fisc, since once the government knows the essential facts of a fraudulent scheme, it has enough information to discover related frauds.

149 F.3d at 234.

Therefore, the Court will apply the test adopted by the Third Circuit in LaCorte to determine whether Lujan is barred by § 3730(b)(5) from bringing the present qui tam action. Thus, if Lujan's claims are based on the same essential facts as Schumer's claims, § 3730(b)(5) bars Lujan's case regardless of whether the two claims incorporate somewhat different details.

2. Lujan's And Schumer's Allegations Are Based On The Same Essential Facts

Judge Ideman determined that Lujan's allegations were "substantially similar" and thus, were "based upon" those publicly disclosed in Schumer's lawsuit. *See* Minute Order Dismissing Relator Lujan's Qui Tam Counts (Mar. 19, 1996). Lujan attempted to distinguish her allegations as involving mischarging within the B-2 program while Schumer's allegations involved cost shifting among the B-2 program and other aircrafts. However, upon reviewing both sets of allegations, the district court previously found that "Lujan's allegations are simply a variation on Schumer's." The court went on to conclude that "[t]o give credence to

Lujan's microscopically fine distinctions between her allegations and those of Schumer would do injustice to the purposes underlying the False Claims Act." *Id.* at 6 (internal citation omitted). In reviewing the district court's determination, the Ninth Circuit affirmed the finding that the:

> Schumer and Lujan allegations both involve cost-sharing transactions among and within the radar systems programs on four aircraft. The two claims involve the same commonality agreements and the same radar program contracts. In sum, we agree with the district court that Lujan's allegations are substantially similar to those disclosed in the earlier Schumer action.

Lujan, 162 F.3d at 1033.

The Court concludes that Lujan's lawsuit is based upon the same essential facts and raises the same issues as Schumer's previously-filed action. Therefore, Lujan's action is barred by § 3730(b)(5).

E. Lujan's Contention That Schumer's Claims Should Not Be Considered Because They Were Not Decided On The Merits Is Incorrect

The Court need not decide whether Lujan's claim would be barred even if Schumer's claims were not decided on the merits because it is clear, given the procedural history of the Schumer action, that the only claims of Schumer's that were not decided on the merits involved pre-1986 conduct, conduct that is no longer at issue in Lujan's case after the Ninth Circuit's recent decision. Lujan's remaining claims parallel Schumer's post-1996 claims which were decided against Schumer on the merits by Judge Pfaelzer in 1992 and affirmed by the Ninth Circuit in 1995. Therefore, Lujan's argument is without merit.

III. Conclusion

Lujan is barred from bringing this qui tam action by § 3730(b0(5) of the FCA because her action is related to a previously-filed qui tam lawsuit initiated by Schumer.[2] Therefore, Lujan's action is dismissed.

IT IS SO ORDERED.

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[2] Because the Court finds that Lujan's action must be dismissed pursuant to § 3730(b)(5), the Court declines to address Hughes' novel arguments that Lujan's action is also barred by res judicata and collateral estoppel.